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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1969~~ 70-154

JOHNNIE PRUETT,
Petitioner

v.

THE STATE OF TEXAS, and
J. F. CLAWSON, Jr.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2-4
Statutes and Constitutional Provisions Involved	5-11
Statement of the Case	11-12
How Federal Questions Presented	14
Reasons for Granting the Writ	14

1. In denying Petitioner leave to Intervene, and in refusing to follow North Carolina v. Pearce, 395 U. S. 711, 719, f. n. 13, the Court of Criminal Appeals denied the equal protection of the laws to Petitioner in a manner calculated to shake criminal jurisprudence throughout the nation. ---- 14

2. The decision below provides for double punishment. ---- 17

3. The decision below particularly denied equal protection of the laws in permitting an appeal by the State of Texas, when such is prohibited under Texas law. ---- 19

4. The Court of Criminal Appeals denied due process to Petitioner by not allowing him a day in court, and by not giving him notice of a proceeding wherein his liberty was directly involved. ---- 19

5. The Court of Criminal Appeals has attempted to insulate its decision from attack here by

Page

professing to interpret a State Statute, Article 5118a, in such a way as to justify its order and protect itself since ordinarily its interpretation of a State statute can not be reviewed; but such attempt must fall because its "interpretation" offends the federal constitution, and particularly the equal protection clause. ---- 22

Conclusion ---- 24

Index to Appendix

Appendix A—Opinion of Court of Criminal Appeals ---- 25

Appendix A-1—Certificate of Clerk of Court of Criminal Appeals ---- 35

Appendix B—Motion for Leave to Intervene ---- 37

Motion for Postponement ---- 38

Intervenor's Motion to Dismiss ---- 42

Alternative Plea for Relief (in Court of Criminal Appeals) ---- 50

Application for Stay ---- 52

Appendix C—Motion of Defendant for Resentencing and for Proper Credit on his Jail Term ---- 56

Defendant's Memorandum Brief on Motion for Resentencing and Discharge ---- 58

CITATIONS

Page

Cases:

Ex parte Anderson (Tex. Crim. App. 1946), 192 S. W. (2) 280 ---- 18

Armstrong v. Manzo, 380 U. S. 545 ---- 21

Arsenault v. Massachusetts, 393 U. S. 5 ---- 18

Barbier v. Connolly, 113 U. S. 27 ---- 17

Bennett v. State, 450 S. W. (2) 652, 657 ---- 18

Burns v. Ohio, 360 U. S. 252 ---- 18

Ex Parte Carlile, 92 Tex. Crim. Rep. 495, 244 S. W. 611 ---- 19

Chandler v. Fulton, 10 Tex. 2 ---- 21

Cochran v. Kansas, 316 U. S. 255 ---- 18

Fite v. State (Tenn. 1905) 88 S. W. 941 ---- 16, 23

Fryckberg v. Scott (Tex. Civ. App), 218 S. W. 21, 23 ---- 18

Garner v. Smith, 40 Tex. 505 ---- 21

Hansbery v. Lee, 311 U. S. 32 ---- 21

Harvey v. State, 201 S. W. (2) 42 ---- 17

Holt v. Virginia, 381 U. S. 131 ---- 21

Hovey v. Elliott, 167 U. S. 409 ---- 21

Hill v. Texas, 316 U. S. 400 ---- 16

Ex Parte Hull, 312 U. S. 546 ---- 18

CITATIONS—Continued

Page

Meadors v. State, Tex. Crim. App., 260 S. W. 580 17

Nichols v. Dalllas, 347 S. W. (2) 326 23

North Carolina v. Pearce, 395 U. S. 711, 719 ..... 2, 12, 14, 15, 18

Robinson v. Beto, 426 Fed. (2) 797 ..... 17, 18

Smith v. Bennett, 365 U. S. 708 18

Snow v. State, 134 Tex. Crim. Rep. 263, 114 S. W. (2) 898 19

Snyder v. Massachusetts, 291 U. S. 97 21

Southwest Savings & Loan v. Faulkner, 331 S. W. (2) 917 23

Texts:

American Jurisprudence:
Vol. 41, page 916 23

American Jurisprudence (Second):
Volume 16:
Pages 941-942 21

Pages 969 et seq. 23

Antieau, Modern Constitutional Law:
Sec. 5:123 19

Corpus Juris Secundum:
Vol. 72, page 886 ..... 23, 24

Texas Jurisprudence (Second)
Vol. 44, page 197 21

CITATIONS—Continued

Page

Constitutional Provisions:

United States Constitution:
- First Amendment ---- 3, 4, 5
- Fifth Amendment ---- 3, 4, 5, 17, 19
- Sixth Amendment ---- 3, 4, 5
- Fourteenth Amendment ---- 2, 3, 4, 5, 19, 21

Texas Constitution:
- Article 5, Section 8 ---- 6
- Article 5, Section 26 ---- 7, 19

Rules of Court:

- Rule 19, par. 1(a) ---- 2, 15
- Rule 23 (1) (f) ---- 14

Statutes:

Federal:
- Title 42, Sec. 1983, U. S. C. ---- 4, 6

Texas Statutes:

Code of Criminal Procedure:
- Article 42.03 ---- 3, 12
- Article 44.01 ---- 7, 19

CITATIONS—Continued

Page

Revised Civil Statutes:

Article 5118a ----------4, 10, 12, 15, 22

Article 6184 l ----------8, 12, 15, 16, 22

IN THE

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OCTOBER TERM, 1970

No. -----

JOHNNIE PRUETT,

Petitioner

v.

THE STATE OF TEXAS, and
J. F. CLAWSON, Jr.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Petitioner, Johnnie Pruett, prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas, entered March 31, 1971.

Opinions Below

The opinion of the Court of Criminal Appeals, not yet reported, appears in Appendix A hereto, post page 25.

Jurisdiction

The judgment and opinion of the Court of Criminal Appeals was delivered March 31, 1971. No motion for rehearing was permitted; the judgment is final; the Court of Criminal Appeals is the highest Court in Texas on such matters. This petition for certiorari was filed within 90 days after March 31, 1971. The jurisdiction of the Supreme Court is invoked under 28 U. S. C. Sec. 1257 (3). We believe that jurisdiction also exists under Supreme Court Rule 19, paragraph 1 (a).

QUESTIONS PRESENTED

1. Whether Johnnie Pruett, a convicted felon, who was discharged, after serving 22 months in jail, by a trial court of general jurisdiction on re-sentencing, which court gave credit for good conduct in line with *North Carolina v. Pearce*, 395 U. S. 711, 719, f. n. 13, was denied procedural due process and *equal protection of the laws*, as guaranteed by the 14th Amendment, when he was refused leave to intervene in an original proceeding in the Court of Criminal Appeals of Texas, when such proceeding was successfully brought by the State of Texas against the trial judge who discharged Pruett, forcing such trial judge to vacate his order of discharge, deny "good conduct" time, and further forcing the trial judge to order Petitioner's re-arrest.

2. Whether Johnnie Pruett, a prisoner in jail pending appeal of his case, who earned credit upon his sentence for good conduct during the appeal, can be constitutionally denied the credit in sentencing him, in view of the 1st, 5th and 14th Amendments to the Constitution of the United States.

3. Whether Johnnie Pruett, a prisoner being resentenced under a State Statute, Article 42.03 of the Texas Code of Criminal Procedure, after the termination of his appeal, and receipt of the mandate of the Court of Criminal Appeals, must be credited with pre-sentence time and with "good conduct" commutation, admittedly earned while in jail pending appeal, in view of the 1st, 5th and 14th Amendments to the Constitution of the United States.

4. Whether when Johnnie Pruett, a prisoner, has lain in county jail during his appeal, and the Texas statutes provide that for good conduct an inmate of a county jail shall be entitled to a credit of an additional one-third of the time served, and such statutes also provide that an inmate of the penitentiary shall be entitled to an equivalent or greater credit for good conduct, and the trial court finds good conduct and awards a credit of one-third, the Court of Criminal Appeals can constitutionally void such credit in view of the 1st, 5th and 14th Amendments to the Constitution of the United States.

5. Whether the Court of Criminal Appeals of Texas can, in an original proceeding, vacate a sentence of a prisoner, Johnnie Pruett, pronounced under Article 42.03 of the Texas Code of Criminal Procedure as a "re-sentencing" after prior issuance of the mandate of the Court of Criminal Appeals, especially when the

re-sentencing amounted to an express discharge of the prisoner, in view of his good conduct credits, without giving the prisoner notice of the original proceeding, and without allowing him to appear, but allowing only that his counsel appear amicus curiae and argue for ten minutes as amicus curiae; in view of the 1st, 5th, 6th and 14th Amendments to the Constitution of the United States.

6. Whether the Court of Criminal Appeals of Texas can, under the guise of an original proceeding in this case, allow the State of Texas an appeal in this case, when the Statutes and Constitution of Texas do not allow the State an appeal, and thereby void Petitioner's discharge and restoration to liberty, awarded by the trial court, in view of the 1st, 5th, and 14th Amendments to the Constitution of the United States.

7. Whether in view of Title 42, Sec. 1983, the Civil Rights Statute, the Court of Criminal Appeals in an original proceeding, without notice to Petitioner and denying Petitioner's counsel the right to appear (except as amicus curiae), could void the good-time credit given Petitioner on his re-sentencing by the trial court, order Petitioner's arrest and confinement in the Penitentiary and deny him a rehearing in view of the 1st, 5th, 6th, and 14th Amendments to the Constitution of the United States.

8. Whether Article 5118a of the Revised Civil Statutes of Texas should be construed as denying the right to credit for good conduct to Petitioner, a prisoner awaiting the outcome of an appeal, in view of the 1st, 5th and 14th Amendments to the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The text of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States read as follows:

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI]

In all criminal prosecutions the accused shall enjoy the right * * * and to have the assistance of counsel * *.

AMENDMENT [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, Sec. 1983 U. S. C. provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Article 5 of the Texas Constitution provides:

§ 8. Jurisdiction of District Court

Sec. 8. The District Court shall have original jurisdiction in all criminal cases of the grade of felony;

* * * * *

The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; *and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is*

not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law. As amended Aug. 11, 1891; proclamation Sept. 22, 1891. (emphasis supplied)

Article 5 of the Texas Constitution provides:

§ 26. Criminal cases; no appeal by state

Sec. 26. The State shall have no right of appeal in criminal cases.

The Texas Code of Criminal Procedure provides:

Article 44.01 [812] [893] [871] State cannot appeal

The State shall have no right of appeal in criminal actions.

The Texas Code of Criminal Procedure provides:

Art. 42.03 [768] [855] [833] Pronouncing sentence; time; credit for time spent in jail between arrest and sentence or pending appeal

If a new trial is not granted, nor judgment arrested in felony and misdemeanor cases, the sentence shall be pronounced in the presence of the defendant at any time after the expiration of the time allowed for making the motion for a new trial or the motion in arrest of judgment; provided that in all criminal cases the judge of the court in which defendant was convicted may within his discretion, give the defendant credit on his sentence for the time, or any part thereof, which said defendant has spent in jail in said cause, from

the time of his arrest and confinement until his sentence by the trial court; and provided further, that in all cases where the defendant has been tried for any violation of the laws of the State of Texas, and has been convicted and has appealed from said judgment and sentence of conviction, and where said cause has been affirmed by the Court of Criminal Appeals, and after receipt of the mandate by the clerk of the trial court, *the judge is authorized to again call said defendant before him; and if pending appeal, the defendant has not made bond and has remained in jail pending the time of such appeal, said trial judge may then in his discretion resentence the defendant, and may subtract from the original sentence pronounced upon the defendant, the length of time the defendant has lain in jail pending such appeal,* noting any credit allowed upon mandate, which credit shall be allowed by the Texas Department of Corrections in all computations affecting the eligibility of the defendant for parole or discharge. Where jail time has been awarded, the trial judge may, when in his discretion the ends of justice would best be served, sentence the defendant to serve his sentence during his off-work hours, or on week-ends. When such a sentence is permitted by the trial judge it must be served on consecutive days or consecutive week-ends. The trial judge may require bail of the defendant to insure the faithful performance of the sentence. The trial judge may attach conditions regarding the employment, travel, and other conduct of the defendant during the performance of such a sentence. (italics supplied)

The Revised Civil Statutes of Texas provide:

Art. 6184 l. Commutation for good conduct

In order to encourage prison discipline, a distinction may be made in the treatment of prisoners so as to extend to all such as are orderly, industrious and obedient, comforts and privileges according to their deserts. The reward to be bestowed on prisoners for good conduct shall consist of such relaxation of strict prison rules and extension of social privileges as may be consistent with proper discipline. Commutation of time for good conduct, industry and obedience shall be granted by the General Manager[1] *and twenty (20) days per month deduction shall be made from the term or terms of sentences of all prisoners in Class I;* provided, however, that for State-approved trusties thirty (30) days deduction per month shall be made from the term or terms of all sentences of such State-approved trusties, and ten (10) days per month deduction shall be made from the term or terms of sentences of all prisoners in Class II as hereinafter provided, when no charge of misconduct has been sustained against a prisoner. * * * * * No overtime allowance or credits, in addition to the commutation of time herein provided for good conduct, may be deducted from the term or terms of sentences with the exception that for extra meritorious conduct on the part of any prisoner, he may be recommended to the Board of Pardons and Paroles and to the Governor for increased commutation or for a pardon or parole. * * * * *

The Classification Committee, as soon as practicable, shall classify all prisoners according to their industry, conduct and obedience in three (3) classifications: Class I, Class II, Class III, and reclassify any of such prisoners from time to time as in their opinion the circumstances may require. *The General Manager*

[1]Changed to director. See art. 6166a—1.

shall keep or cause to be kept a conduct record in card or ledger form and a calendar card on each inmate showing all classifications, changes of classifications and forfeitures of commutation of time and reasons therefor. As soon as practicable, the General Manager shall change the conduct records of prisoners now in the penitentiary to conform with said conduct record and calendar card. * * * * * (emphasis added)

The Revised Civil Statutes of Texas also provide:

Art. 5118a. Commutation for good conduct; forfeiture of commutation; record

In order to encourage county jail discipline, a distinction may be made in the terms of prisoners so as to extend to all such as are orderly, industrious and obedient, comforts and privileges according to their deserts; the reward to be bestowed on prisoners for good conduct shall consist of such relaxation of strict county jail rules, and extension of social privileges as may be consistent with proper discipline. Commutation of time for good conduct, industry and obedience may be granted the inmates of each county jail by the sheriff in charge. A deduction in time not to exceed one third (1/3) of the original sentence may be made from the term or terms of sentences when no charge of misconduct has been sustained against the prisoner. This Act shall be applicable regardless of whether the judgment of conviction is a fine or jail sentence or a combination of jail sentence and fine. A prisoner under two (2) or more cumulative sentences shall be allowed commutation as if they were all one sentence. *For such sustained charge of misconduct in violation*

of any rule known to the prisoner (including escape or attempt to escape) any part or all of the commutation which shall have accrued in favor of the prisoner to the date of said misconduct may be forfeited and taken away by the sheriff. No other time allowance or credits in addition to the commutation of time for good conduct herein provided for may be deducted from the term or terms of sentences. *The sheriff shall keep or cause to be kept a conduct record in card or ledger form and a calendar card on each inmate showing all forfeitures of commutation time and the reasons therefor.* As amended Acts 1963, 58th Leg., p. 943, ch. 371, § 1. (emphasis added)

STATEMENT OF THE CASE

The facts material to the consideration of the questions presented are:

Petitioner was convicted of sodomy in July 1969, by the District Court of Coryell County, Texas. He duly appealed and his conviction was affirmed by the Court of Criminal Appeals of Texas in November, 1970. He duly appealed from that affirmance and his appeal therefrom still pends before the Supreme Court of the United States in Cause No. 1390, styled Johnnie Pruett vs. The State of Texas, pending rehearing.

Stays were temporarily granted by the Court of Criminal Appeals but further stays were denied by the Supreme Court, although the appeal still pends, as aforesaid.

The Court of Criminal Appeals issued its mandate,

affirming Petitioner's two-year sentence, to the Court of Coryell County (District Court) which tried Petitioner. Such mandate was issued March 3, 1971, and pursuant to the Texas Statute, Article 42.03 of the Code of Criminal Procedure, the trial Court, the Honorable J. F. Clawson, Jr., proceeded to re-sentence Petitioner. Upon such re-sentencing, Judge Clawson found that Petitioner had lain in jail since April 15, 1969, and that Petitioner was entitled to credit on his sentence for part of such time in jail. This included the time in jail on appeal. Judge Clawson also allowed a credit for 1/3 additionally upon such time for good conduct, because *both the county jail statute, Article 5118 a, and the penitentiary Statute, Article 6184 l, allow a credit for at least 1/3 of confinement time for good conduct.* Judge Clawson held that to deny Petitioner the credit for 1/3 would deny him the equal protection of the laws and would subject him to double punishment contrary to the rules laid down by the Supreme Court under *North Carolina v. Pearce*, 395 U. S. 711, 719, F.N. 13.

Applying the 1/3 credit for good behavior, Judge Clawson held that Petitioner had more than served his time, and he thus discharged Petitioner.

On March 17, 1971, the District Attorney for the 52nd Judicial District for Coryell County sought a Writ of Prohibition from the Court of Criminal Appeals. No notice of this Application was served on Johnnie Pruett nor was it served on Johnnie Pruett's attorneys. On the same date, March 17, 1971, the Court of Criminal Appeals issued an order to show cause to Judge Clawson commanding him to appear on March 19, 1971, at 2:00 p.m. and show why a Writ

of Prohibition should not be granted vacating Judge Clawson's order.

No notice of the Show Cause Order was issued to Johnnie Pruett. Johnnie Pruett's attorneys found out about it from Judge Clawson over long distance telephone on the evening of March 17. On the morning of March 18, such attorneys immediately went to Judge Onion, the Presiding Judge of the Court of Criminal Appeals and asked if they would be allowed to appear and they were told that they would be allowed to appear. They told Judge Onion that not enough time had been allowed and Judge Onion stated that the case had been moved up until Monday, March 22, at the instance of Judge Clawson's attorneys. Petitioner's attorney told Judge Onion that that was not enough time, and more time was desired, and Judge Onion stated that the Court would not grant nor be receptive of a motion for further time. On March 22, 1971, Petitioner filed a Motion for Leave to Intervene, a Motion for Postponement, and a Motion to Dismiss. All these were summarily denied by the Court of Criminal Appeals without hearing within three hours, except it stated it would allow the Motion for Leave to Intervene to be treated as an Application of Amicus Curiae and as such granted (Appendix A-1, page 35 post), but only ten minutes was allowed the Petitioner's attorney to argue as amicus curiae, the same day.

On March 31, 1971, the Court of Criminal Appeals ordered Judge Clawson to vacate Petitioner's discharge and to have Petitioner arrested.

HOW FEDERAL QUESTIONS PRESENTED

The Opinion of the Court of Criminal Appeals is, as stated, in Appendix A, page 25 post. It was delivered March 31, 1971. It does not expressly pass on the constitutional issues. However, the fact that we duly and specifically raised the constitutional issues is shown in our Motion for Leave to Intervene, Motion to Postpone, and Motion to Dismiss filed in the Court of Criminal Appeals, and also in our Motion for Stay, filed in the Court of Criminal Appeals. These are lengthy and copied for the convenience of the Court in Appendix B, post, pages 36 to 55.

In compliance with Rule 23 (1) (f) we show that the constitutional rights of Petitioner to discharge under the Texas statutes for good conduct, were raised specifically in the trial court in our Motion for Resentencing, as well as in the above-mentioned papers in the Court of Criminal Appeals. The trial court Motion for Resentencing and the memorandum brief submitted to the Trial Court, contemporaneously with the Motion for Resentencing, are copied in Appendix C, post pages 56 to 64.

The trial court was duly impressed with our Motion and granted it, discharging Petitioner.

The Court of Criminal Appeals, as its opinion shows, Appendix A, page 25 post, largely ignored us, ordering Petitioner's re-confinement.

REASONS FOR GRANTING THE WRIT

1. In denying Petitioner leave to Intervene, and in refusing to follow North Carolina v. Pearce, 395 U. S. 711, 719, f. n. 13, the Court of Criminal Appeals denied the equal protection of the laws to Petitioner in a

manner calculated to shake criminal jurisprudence throughout the nation.

The state court has decided these federal questions of substance perhaps not *precisely* already determined by the Supreme Court, but, in any event, in a way probably not in accord with applicable decisions of the Supreme Court, within the meaning of Rule 19, 1 (a). We think there is a direct conflict with *North Carolina v. Pearce*, 395 U. S. 711, 719, f. n. 13.

With respect to the denial of Petitioner's credit for good conduct which had been allowed by the trial Court, the Court of Criminal Appeals completely ignored our argument, and Judge Clawson's attorney's argument that equal protection of the laws demanded Petitioner be given credit. There are two Statutes in Texas regulating credit for good conduct. They are Articles 5118a and 6184 l. Article 5118a relates to "inmates of each county jail," and 6184 l to people in the Penitentiary. Both require a credit of at least one-third of the actual time in custody where there is good conduct. We argued that *Petitioner could not be treated as neither fish nor fowl;* that the fact that he was in county jail, awaiting disposition of his appeal, and neither serving out a misdemeanor charge nor in the penitentiary actually serving out of record his prison sentence, could not constitutionally prevent him from receiving the equal treatment of the laws. Judge Clawson, the trial judge, agreed with us. *The Court of Criminal Appeals, instead, set up a "straw man," saying that the controlling issue was whether Article 5118a could be construed as relating to prisoners convicted of felonies and awaiting their appeals.* Looking to the "fine or jail" terminology in the statute, the Court of

Criminal Appeals "interpreted" the Article as inapplicable to Petitioner. Yet *the Court of Criminal Appeals ignored Article 6184 l and our argument specifically pointing it out.* Appendix B, page 48. It did not even bother to mention *Gilliam v. State* (Tenn. 1939) 126 S. W. (2) 305, which we cited, Appendix B, page 48, and which holds that the prisoner's right to credit cannot be defeated by sending him to jail rather than directly to the penitentiary when convicted of a felony. See also *Fite v. State* (Tenn. 1905), 88 S. W. 941 and *State v. McClellan*, 9 S. W. 233.

Furthermore, although the Court of Criminal Appeals had previously recognized in *Bennett v. State*, 450 S. W. (2) 652, 657, that the time credited "for good behavior" must be subtracted from a sentence, citing *North Carolina v. Pearce*, 395 U. S. 711, 719, f. n. 13, and although in its Opinion it recognized that we had cited *Pearce* to the trial court, it studiously ignored and refused to mention the controlling point that *Pearce*, and the principle mentioned in footnote 13, at 395 U. S. 719, control the basis of this case.

Denial of certiorari here will disturb the whole system of criminal jurisprudence in the United States, because it will persuade State courts to make unwarranted distinctions between jail and prison time.

In short, we think the principles of *Pearce*, while perhaps limited on the facts to inmates of prisons, should under the Constitution be applied to all people imprisoned or incarcerated for, or as a result of, a crime—whether they are in a workhouse, jail, county farm, or a Penitentiary. Criminals are entitled to the equal protection of the laws. *Hill v. Texas*, 316 U. S.

400; *Barbier v. Connolly*, 113 U. S. 27. In the last case the court said: "* * in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offense."

2. The decision below provides for double punishment.

Petitioner having been discharged by a court of competent jurisdiction—even the Court of Criminal Appeals did not attack the jurisdiction of the trial court (only its authority)—it is double punishment, contrary to the Fifth Amendment, to again arrest Petitioner for the same offense, and punish him again. The Fifth Amendment clearly says: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Pearce*, we respectfully say, would apply such principle to Petitioner, and those like him. See *Robinson v. Beto*, 426 F. (2) 797. The penumbra of the opinion of the Court of Criminal Appeals, if certiorari be not granted, will confound the judges in every state in the Union.

The Court of Criminal Appeals has begged the question by saying it is enforcing its own jurisdiction. Under the guise of a reformation of sentence, it has no jurisdiction to make an order which is, in effect, the pronouncing of a new sentence. *Meadors v. State*, Tex. Crim. App., 260 S. W. 580. The Court of Criminal Appeals has no jurisdiction with reference to fixing punishment except to see that it was within the power of the jury or court below to assess it. *Harvey v. State*, 201 S. W. (2) 42. Unless a sentence is pronounced validly by the District Court, the Court of

Criminal Appeals has no jurisdiction over the case. The Court of Criminal Appeals in a previous case has already recognized that *North Carolina v. Pearce*, 395 U. S. 711, 719, footnote 13, requires the subtraction by the trial court of "time credited for good behavior." See *Bennett v. State*, at 450 S. W. (2) 652, 657. The District Court of Texas has unparalleled general jurisdiction to fill in any gaps in the law. The Constitution of Texas gives the District Court general jurisdiction "over all causes of action *whatever* for which a remedy or jurisdiction is not provided by law or this Constitution." Texas Constitution, Article 5, Section 8. It has been said that: "*no court of equity in the world, chancery or otherwise, possesses the broad and comprehensive powers to administer equity as the District Courts" of Texas. Fryckberg v. Scott* (Tex. Civ. App.), 218 S. W. 21, 23.

The District Court of Texas therefore had power to apply the equal protection of the laws under the Federal Constitution, 14th Amendment, and also to prevent multiple punishment under the doctrine of *Pearce* and *Robinson v. Beto*, 426 F. (2) 797. See *Arsenault v. Massachusetts*, 393 U. S. 5; *Cochran v. Kansas*, 316 U. S. 255; *Burns v. Ohio*, 360 U. S. 252; *Smith v. Bennett*, 365 U. S. 708; *Ex parte Hull*, 312 U. S. 546.

In Texas, time credited for good behavior is time *earned*. It is not a gift or an act of clemency. *Ex Parte Anderson*, 192 S. W. (2) 280 (Tex. Crim. App. 1946). The trial court found that such time had been earned as a matter of fact. The Court of Criminal Appeals did not disturb this finding of fact. Furthermore, the Court of Criminal Appeals does not have

fact finding jurisdiction. *Ex parte Carlile*, 92 Crim. Rep. Tex., 495, 244 S. W. 611; *Snow v. State*, 134 Tex. Crim. Rep. 263, 114 S. W. (2) 898.

3. The decision below particularly denied equal protection of the laws in permitting an appeal by the State of Texas, when such is prohibited under Texas law.

Article 44.01 of the Texas Code of Criminal Procedure and Article 5, Sec. 26 of the Texas Constitution prohibit an appeal by the State in Criminal cases. Plainly in this case the Court of Criminal Appeals has allowed an appeal. Such is a denial of equal protection as well as due process. The Supreme Court has many times ruled that where the federal or state governments provide for appeals by an accused, discriminatory denial of a statutory right of appeal violates the equal protection clause of the 14th Amendment and the 5th Amendment. *Cochran v. Kansas*, 316 U. S. 255; Antieau, Modern Const. Law Sec. 5:123. It should be equally a denial of equal protection to allow the State to appeal one case when the statutes prohibit its appeals generally. Such discriminates against Petitioner.

4. The Court of Criminal Appeals denied due process to Petitioner by not allowing him a day in court, and by not giving him notice of a proceeding wherein his liberty was directly involved.

The record in this case is a sad demonstration, and a startling one, of the denial by the highest criminal court in Texas of a day in court to a man whose liberty is directly involved. The proceeding below was against the Honorable J. F. Clawson, District Judge,

only; not any notice was given Petitioner. When Petitioner's counsel heard about it (on the same day the show-cause order was served (nighttime) he promptly went the very next day to the Presiding Judge to find out if he could appear and if he could have more time. He was assured he could appear either for the Petitioner or for Judge Clawson, but that he could not have more time. The show cause order had been issued on March 17; it commanded Judge Clawson's appearance two days later and was served on Judge Clawson only. Judge Clawson's attorneys got an extension of two days; that is, at their request, the Court of Criminal Appeals passed the hearing over the week-end (Saturday and Sunday) until the following Monday afternoon at 2:00 p.m.

Petitioner's counsel at 11:00 a.m. on that Monday filed their motion for leave to intervene, motion to postpone, and motion to dismiss on the merits. At 2:00 p.m. the Court of Criminal Appeals assembled, and first-out stated that it was aware of the said motion for leave, motion to postpone and motion to dismiss; and further said that the motion to postpone and dismiss was already overruled and that the motion for leave to intervene would be treated as a motion for appearance amicus curiae, and, as such, granted. Ten minutes were then given Petitioner's counsel to argue, but he was not then allowed to protest or to speak at all when the announcement was made that he could have ten minutes only.

May it please the Court, Petitioner had a right to appear and argue just as much as did Judge Clawson. However necessary it was to protect the dignity of the District Court (for which Petitioner has rever-

ence), and however brilliant was Judge Clawson's argument, as well as his brief, Petitioner was the poor, 20-year-old, whose liberty was at stake, and who had just a few days before been set free by Judge Clawson in a proceeding of which the State had notice, and in which it argued. Since it was Petitioner's liberty which was at stake, we say the Court of Criminal Appeals had no right to ignore Petitioner. *This was not, according to the State, an appellate proceeding;* therefore Petitioner *had the right to be present* and have counsel present with sufficient time permitted so that counsel could be effective.

Procedural due process requires notice and an opportunity to be heard. *Holt v. Virginia*, 381 U. S. 131; *Snyder v. Massachusetts*, 291 U. S. 97; 16 Am. Jur. (2) 941-942.

As is true elsewhere, intervention by a real party in interest is a basic right in Texas. *Chandler v. Fulton*, 10 Tex. 2; *Garner v. Smith*, 40 Tex. 505; 44 Tex. Jur. (2) 197.

Judicial action against the person of an absent party is not due process. *Hansberry v. Lee*, 311 U. S. 32; 16 Am. Jur. (2) 969. No one may be punished without being heard. *Hovey v. Elliott*, 167 U. S. 409. The opportunity to be heard must be granted at a meaningful time, and in a meaningful manner. *Armstrong v. Manzo*, 380 U. S. 545.

We respectfully say that the record here shows that kind of violation of due process which "offends some principle of justice so rooted in the traditions and con-

science of our people as to be ranked as fundamental," as stated in *Snyder*. Likewise, as Justice Frankfurter would say this case offends "moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history." *Solesbee v. Balcom* (1950) 339 U. S. 9 (dissenting)

5. The Court of Criminal Appeals has attempted to insulate its decision from attack here by professing to interpret a State Statute, Article 5118 a, in such a way as to justify its order and protect itself since ordinarily its interpretation of a State statute can not be reviewed; but such attempt must fall because its "interpretation" offends the federal constitution, and particularly the equal protection clause.

The Supreme Court of the United States will, of course, defer to the interpretation of a state statute by the highest court of that state, if possible. See *Bush v. Texas* (1963), 372 U. S. 586. But, in this case, the Court of Criminal Appeals has deliberately ignored Article 6184 l, cited in our Motion to Dismiss before the Court of Criminal Appeals. Appendix B, pages 46-47. The Court of Criminal Appeals says in its opinion: "The real question presented is the trial court's authority to grant any 'good time' credit under the provisions of Article 5118a." With all due respect to the Court of Criminal Appeals, it was deliberately setting up a "straw man" that it could knock down.

The *real question* was the constitutional one of whether, since Articles 5118a and 6184 l both provide for credit of additional time in the case of good conduct, for all prisoners wherever they may be (without

expressly naming people who are awaiting an appeal), the trial court could deny Petitioner's request for credit without denying the equal protection of the laws.

Therefore, we say that Article 5118a must be interpreted to protect Petitioner, to save it from unconstitutionality.

The argument by the Court that the credit provided in the statute, Article 5118 a, is discretionary with the Sheriff must fall, *to save the statute from unconstitutionality.* Article 6184 l says that the credit "shall" be given. Therefore the use of the word "may" in Article 5118a must be treated as "shall." Otherwise, unlimited and unconstitutional discretion is given an administrator, violating the prohibition against delegation of legislative power. *Fite v. State* (Tenn. 1905) 88 S. W. 941. It is settled in Texas that the Legislature cannot delegate its power without at the same time setting up some reasonable standard for the administrator to follow: *Southwest Savings & Loan v. Faulkner* (Texas Sup. Ct.) 331 S. W. (2) 917; *Nichols v. Dallas*, 347 S. W. (2) 326.

Of course, the discretion argument must fall for another reason. The Sheriff kept no records; the conduct must be presumed to have been good. Parol evidence of misconduct is inadmissible. 72 C. J. S. 886. See *Gilliam v. State* (Tenn. 1939) 126 S. W. (2) 305; *State v. McClellan*, 9 S. W. 233.

Statutes providing for commutation must be construed if possible to grant commutation as a matter of right; not as a favor. 41 Am. Jur. 916. The pris-

oner is always entitled to release at the earliest possible moment under such statutes. 72 C. J. S. 886.

CONCLUSION

Petitioner prays that Writ of Certiorari issue to the Court of Criminal Appeals of Texas and that general relief be granted in the discretion of the Court.

Respectfully submitted,

DAVID L. TISINGER
402 First National Life Building
702 Colorado
Austin, Texas 78701
Attorney for Appellant

APPENDIX A

STATE OF TEXAS, ex. rel.

Leslie B. Vance,

District Attorney

52nd Judicial District, Relator

NO. 44,043 Vs. Original Application

J. F. Clawson, Jr., Judge

169th Judicial District Court

sitting as Judge for the

52nd Judicial District Court, Respondent

OPINION

This is an action seeking the issuance of Writ of Prohibition against the respondent J. F. Clawson, Jr., Judge of the 169th Judicial District Court of Bell County, Texas.

Leave to file the application for writ of prohibition was granted and the application is before this court upon petition and answer supported by brief and oral argument.

The record reflects that one Johnnie Pruett was indicted in Coryell County on April 15, 1969, for the offense of sodomy alleged to have occurred "on or about" April 11, 1969.

On July 25, 1969, Pruett waived trial by jury and entered a plea of nolo contendere before the 52nd Judicial District Court to the charge against him. His punishment was assessed at two years' confinement in the Texas Department of Corrections. On September 3, 1969, he was formally sentenced. At such time the trial judge gave him credit on his sentence from July 25, 1969, for some of the time spent in custody prior to sentence. Notice of appeal was then given.

Pruett's conviction was affirmed on appeal, 463 S. W. 2d 191, with this court upholding the constitutionality of Article 524, V.A.P.C., as to forcible sodomy despite the holding in Buchanan et al. v. Batchelor, et al., 308 F. Supp. 729, that such statute was "void on its face for constitutional overbreath." This court relied in part upon Lawrence v. Woods, 8 Cr.L. 2084, as "recent authority to support the view that state courts are not bound by the rulings of lower Federal courts. . . ."

After the motion for rehearing and a temporary stay of mandate at Pruett's request the mandate of this court was issued on March 3, 1971, commanding the trial court "to observe the order of our said Court of Criminal Appeals in this behalf and in all things to have it duly recognized, obeyed and executed."

Thereafter Pruett's attorney filed a motion seeking credit upon such sentence for the time Pruett had lain in jail pending appeal. Such motion was presented to the respondent Clawson, Judge of the 169th Judicial District Court sitting in the 52nd Judicial District

Court of Coryell County by administrative assignment.

A brief was apparently offered in support of such motion citing Articles 42.03 and 42.09, V.A.C.C.P.; North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656; Robinson v. Beto, 5 Cir., 426 F.2d 797, and this court's decision in Ex parte Griffith, 457 S.W. 2d 60. The brief also urged Pruett be given additional credit on his sentence under the provisions of Article 5118a, V.A.C.S. Testimony was then offered in support of such motion which reflected that Pruett had been in custody under the indictment in question since April 15, 1969.

At the conclusion of the hearing the respondent Clawson noted that on the date of the hearing (March 8, 1971) Pruett was entitled to credit for or to have subtracted from his two year sentence "19 months and 14 days spent in jail pending appeal."[1] In addition the trial court concluded Pruett was entitled to "good time credit equal to 1/3 of the days actually served in jail in the amount of 6 months and 24 days." See Article 5118a, V.A.C.S.

The trial court in its order then "subtracted" the 19 months and 14 days from the original sentence leaving 4 months and 16 days on the original sentence which, "after allowing 'good time' credit of 6 months

[1]This figure was apparently arrived at by considering the 39 days of pre-sentence custody for which Pruett had been given credit at the time of sentence on September 3, 1969, the 18 months from the date of sentence to date of the mandate (March 3, 1971) and the 5 days intervening between date of mandate and the hearing in question.

and 24 days" the court "considered" the original sentence "fully served." Pruett was then ordered "released and discharged from custody."

Nothing in the record before us reflects that at that particular time the relator objected to or protested the respondent's actions.

At the outset there can be no question but that Pruett was entitled to the pre-sentence custody credit granted him at the time of his sentence. See Article 42.03, V.A.C.C.P.; Gremillion v. Henderson, 5 Cir., 425 F.2d 1293; Ex parte Griffith, 457 S.W. 2d 60. And such credit is not lost by the fact that notice of appeal is given. Ex parte Griffith, supra. However, the sentencing judge having exercised his discretion to give credit for all or a part of a defendant's pre-sentence custody, another judge, even one sitting in the same court, may not after conviction again exercise discretion as to pre-sentence custody. Ex parte Washburn, 459 S.W. 2d 637.

And it is true that under the decision of this court in Ex parte Griffith, supra, the trial court had not only the right but the duty to grant to Pruett credit for the 18 months he had lain in jail pending appeal.

And under the provisions of Article 42.09, V.A.C.C.P., where an appeal has been taken and the defendant is in custody, the sentence begins to run on the date of the mandate. Therefore there is no question that Pruett was entitled to the 5 day credit from March 3 to March 8, 1971, even without court order.

There can be then no quarrel with the 19 months and 14 days credit granted Pruett by the respondent.

The real question presented is the trial court's authority to grant any "good time" credit under the provisions of Article 5118a, V.A.C.S., and then to order Pruett's release.

Such statute provides:

> "In order to encourage county jail discipline, a distinction may be made in the terms of prisoners so as to extend to all such as are orderly, industrious and obedient, comforts and privileges according to their deserts; the reward to be bestowed on prisoners for good conduct shall consist of such relaxation of strict county jail rules, and extension of social privileges as may be consistent with proper discipline. Commutation of time for good conduct, industry and obedience may be granted the inmates of each county jail by the sheriff in charge. A deduction in time not to exceed one third (1/3) of the original sentence may be made from the term or terms of sentences when no charge of misconduct has been sustained against the prisoner. This Act shall be applicable regardless of whether the judgment of conviction is a fine or jail sentence or a combination of jail sentence and fine. A prisoner under two (2) or more cumulative sentences shall be allowed commutation as if they were all one sentence. For such sustained charge of misconduct in violation of any rule known to the prisoner (including escape or attempt to escape) any part or all of the commutation which shall have accrued in favor of the prisoner to the date of said misconduct may be forfeited and taken away by the sheriff. No other time allowance or credits in addition to the commutation of time for good conduct herein provided

for may be deducted from the term or terms of sentences. The sheriff shall keep or cause to be kept a conduct record in card or ledger form and a calendar card on each inmate showing all forfeitures of commutation time and the reasons therefor."

Such statute was first enacted in 1955 and was amended in 1963 following Attorney General's Opinion WW 1326 (May 2, 1962) which held that the act had no application to jail prisoners whose sole punishment consisted of a fine and court costs and who is "laying out" such fine and costs. See Article 45.53 (former Art. 920), V.A.C.C.P.

It is clear from the history and the wording of the present statute that the same is applicable only to misdemeanor "terms of prisoners . . . . regardless of whether the judgment of conviction is a fine or jail sentence or a combination of jail sentence and fine." Attorney General's Opinion C-310 (Sept. 17, 1964) expressly held that Article 5118a, supra, had no application "to a prisoner incarcerated in county jail under a sentence calling for imprisonment in the penitentiary. . . ."

In the case at bar the punishment assessed does not consist of a term in the county jail but of a felony sentence to be served in the Texas Department of Corrections. In cases where, following a felony conviction, a prisoner is confined in jail pending appeal because of financial inability to make an appeal bond or where the punishment is in excess of 15 years (Article 44.04, V.A.C.C.P.), such prisoner is not serving a

"term" in the county jail so as to render the provisions of Article 5118a, supra, applicable.[2]

Even if this were not so, there is another reason why Article 5118a, supra, is not applicable in the case at bar. Such statute provides that the sheriff shall have the sole discretion in granting commutation of time of those prisoners in his custody serving jail terms in the county jail. See Attorney General's Opinion C-310, supra. In Attorney General's Opinion WW 1326, supra, it was written: "The judge of the court in which the prisoner was convicted has no powers of authority under Article 5118a, V.A.C.S."

At the hearing on the motion for credit on the sentence following receipt of this court's mandate Sheriff Cummings of Coryell County testified he had not kept a conduct record card or ledger on Pruett, and it appears the sheriff made no effort to grant Pruett any commutation of his time or expressed any desire to do so. In fact, Attorney General's Opinion C-310, supra, holds that the sheriff cannot make any commutation of a felony sentence.

Having thus determined that the trial judge had no authority to grant credit under the provisions of Article 5118a, V.A.C.S., and to that extent that his order is void, we next turn to the question of whether a writ of prohibition will lie under the circumstances described.

---

[2]In view of Pruett's sentence of two years' confinement in the Texas Department of Corrections he could have at any time upon making the requisite appeal bond ended his confinement or "term" in the county jail.

"The Court of Criminal Appeals is the court of last resort in this state in criminal matters. This being so, no other court of this state has authority to overrule or circumvent its decisions, or disobey its mandates." State ex rel. Wilson v. Briggs, 351 S.W. 2d 892, 894.

The Constitution of this state, Article V, Sec. 5, provides that this court and the judges thereof "shall have the power to issue the writ of habeas corpus, and under such regulations as may be prescribed by law, *issue such writs as may be necessary to enforce its own jurisdiction.*" (emphasis supplied)

There can be no question that this court may issue a writ of prohibition in those cases in which is it necessary to enforce its jurisdiction. 46 Tex.Jur.2d, Prohibition, Sec. 11, p. 460; State ex rel. McNamara v. Clark, 187 S.W. 760; Gooch v. Fuchs, 339 S.W.2d 202; State ex rel. Wilson v. Briggs, supra; State v. Klein, 224 S.W. 2d 250.

But we must determine whether the issuance of such writ is applicable under the facts presented by the case at bar.

It has been said that "a writ of prohibition is that process by which a superior court prevents inferior courts, tribunals, officers, or persons from usurping or exercising jurisdiction with which they have not been vested." 73 C.J.S., Prohibition, Sec. 1, p. 9.

It is noted though that "Prohibition issues to prevent the commission of a future act and not to undo, nullify, or review an act already performed; it will

not be granted when the act sought to be prevented is already done, but will lie when such act is not a full, complete and accomplished judicial act." 73 C.J.S., Prohibition, Sec. 10c, p. 30.

Since, in the case at bar, the respondent Clawson has granted Pruett credit under the provisions of Article 5118a, supra, and released him by order of court, it is clear that the act sought to be prevented is already an accomplished fact. Under these circumstances, we conclude prohibition is not the proper remedy.

In determining whether the issuance of a writ is necessary to protect its jurisdiction this court will not, however, be delimited by the denomination of the pleadings by the relator. The court will look to the essence of the pleadings, including the prayers therein as well as the record before the court. When that is done in this case it is apparent that relator is not seeking to restrain future acts but seeking to have this court direct the respondent Clawson to set aside an order already entered insofar as said order is invalid. Thus it is apparent that the relator is in fact seeking a writ of mandamus.[3]

We conclude that the issuance of a writ of mandamus is necessary in order to protect this court's jurisdiction and to insure that the mandate of this court not be thwarted and the relator has no other adequate remedy.

---

[3]"A writ of prohibition has many of the characteristics of a writ of mandamus, except that the latter commands the performance of an act, whereas the former restrains its performance." 46 Tex.Jur.2d, Prohibition, Sec. 2, p. 446.

The respondent is directed to set aside that portion of the order granting Pruett "good time" credit on his sentence under Article 5118a, supra, to issue a capias for Pruett's arrest (Cf. Article 44.05, V.A.C.C.P.) and to perform the ministerial duty of carrying out the mandate of this court.

We assume that the respondent will immediately perform his duty as herein set out. Writ of mandamus will issue only if he refuses to do so.

No motion for rehearing will be entertained.

It is so ordered.

Onion, Presiding Judge

(Delivered March 31, 1971)

Roberts, J., not participating.

APPENDIX A-1

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS OF TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal appeals of Texas, do hereby certify that the following announcement was made from the Bench of the Court of Criminal Appeals on March 22, 1971 as follows:

> I think at the outset that we should announce that the Court is aware of the motion for postponement and motion to dismiss which has been filed by Intervenor and said motions will be denied and overruled. However, the motion for leave to intervene will be considered as a request for amicus curiae and will be granted.

in Cause No. 44,043 and styled;

> State of Texas ex rel Leslie B. Vance, District Attorney 52nd Judicial District Court of Coryell County
>
> vs.
>
> J. F. Clawson, Jr., Judge, 169th Judicial District Court sitting in the 52nd Judicial District Court of Coryell County

WITNESS, my hand and the Seal of the Court at Austin, Texas, this *1st* day of April, A. D. 1971.

GLENN HAYNES, CLERK

COURT OF CRIMINAL APPEALS OF TEXAS

APPENDIX B

"NO. 44,043

"IN THE COURT OF CRIMINAL APPEALS"
AUSTIN, TEXAS

"STATE OF TEXAS ex rel

LESLIE B. VANCE, DISTRICT ATTORNEY
52ND JUDICIAL DISTRICT

CORYELL COUNTY, TEXAS, RELATOR

VS

J. F. CLAWSON, JR., JUDGE
Sitting for the 52nd Judicial District Court
RESPONDENT

"MOTION FOR LEAVE TO INTERVENE BY JOHNNIE PRUETT

"TO SAID HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

"Now comes Johnnie Pruett, the person who is alleged by Relator to have been improvidently released from custody, and shows unto the Court that he is a

real party in interest, *his civil and Constitutional rights being at stake*, as well as his liberty, and begs leave to intervene, offer evidence, present motions and arguments, and have the proceedings herein transcribed by a Court Reporter (without expense to the Court). (italics supplied)

Burrell Johnston
1108 Nueces
Austin, Texas 78701

Stayton, Maloney, Black, Hearne & Babb
By Frank Maloney
Capital National Bank Building
Austin, Texas 78701

David L. Tisinger
404 First National Life Building
Austin, Texas 78701

ATTORNEYS FOR JOHNNIE PRUETT

Filed in

Court of Criminal Appeals
Mar 22 1971
Glenn Haynes, Clerk

"NO. 44,043

"IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

"STATE OF TEXAS, ex rel
LESLIE B. VANCE, DISTRICT ATTORNEY,
Relator

VS

J. F. CLAWSON, JR., JUDGE
Sitting for the 52nd Judicial District Court,
Respondent

Motion for Postponement by Johnnie Pruett

"TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Now comes Intervenor, Johnnie Pruett, and respectfully moves for a postponement herein, showing:

1.

"Intervenor was not served with any official notice of this proceeding. His attorneys first learned of same at 7:00 p.m. March 17, 1971, and were unable to get copies of the papers filed herein until 1:00 p.m. March 18, 1971. The setting for Monday, March 22, 1971, was made without the knowledge of or consent of Intervenor, or his attorneys.

2.

"In view of the grave questions involved, which directly concern Intervenor's liberty, and in view of the minimal inconvenience to the State, this matter should be postponed at least ten days in order that counsel may adequately prepare Intervenor's pleadings and motions, as well as arguments. Counsel have not had adequate time at this stage in spite of the utmost diligence.

3.

"*Intervenor respectfully says that the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States require that his counsel have at least ten more days for adequate preparation.* (italics supplied)

4.

"After approval of the record by the trial Court in cause no. 43,193, Pruett v. State, which approval required many months after preparation, the appellate processes before this Court required, as the Court judicially knows, an additional period of many months, and Intervenor was in the County jail for 22 months, a longer period than he presumably would have been required to serve had he gone on to the Penitentiary. His pre-sentence time in jail was only 4 months. His appeal to the United States Supreme Court is still pending in cause No. 1390 in that Court, although stays have been denied him—we think out of respect

to the decision by this Court not to grant further stay of the mandate.

5.

"In view of the questions involved, and allegations made, an additional delay of ten days will not hurt the State nor the Respondent.

"WHEREFORE, Intervenor prays that this cause be postponed for a period of at least ten days and for general relief, and that, in any event, counsel be allowed ten days after submission to file briefs herein.

Burrell Johnston
1108 Nueces
Austin, Texas 78701

Stayton, Maloney, Black, Hearne & Babb
By Frank Maloney
Capital National Bank Building
Austin, Texas 78701

David L. Tisinger
404 First National Life Building
Austin, Texas 78701

ATTORNEYS FOR INTERVENOR JOHNNIE PRUETT

Filed in
Court of Criminal Appeals
Mar 22 1971
Glenn Haynes, Clerk

"STATE OF TEXAS
COUNTY OF TRAVIS

"Before me, the undersigned authority, on this day personally appeared David L. Tisinger, who, being by me duly sworn, upon his oath deposed and said that the facts stated in the above and foregoing Motion for Postponement by Johnny Pruett are true and correct.

David L. Tisinger
404 First National Life Building
Austin, Texas
78701

"Sworn to and subscribed before me this the 22nd day of March, 1971, to certify which witness my hand and seal of office.

D. J. Hardwick
Notary Public Travis County,
Texas

A True Copy

Attest:

Glenn Haynes, Clerk
Court of Criminal Appeals of Texas
By Tony Bennett
Deputy

"No. 44,043

"IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

AUSTIN, TEXAS

"STATE OF TEXAS, ex rel
LESLIE B. VANCE, DISTRICT ATTORNEY,
Relator

VS

J. F. CLAWSON, JR., Judge
Stting for the 52nd Judicial District Court,
Respondent

"INTERVENOR'S MOTION TO DISMISS

"TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

"Now comes the Intervenor, Johnnie Pruett, and respectfully moves, subject to his Motion for Postponement, upon which he still insists and relies, that the Petition for Writ of Prohibition be dismissed, and in the alternative denied, showing:

1.

"The Court of Criminal Appeals is without jurisdiction to issue the writ, because:

"(1) Issuance of such would allow the State to appeal, contrary to Article 44.01 of the Code of Criminal Procedure, and contrary to Article 5, Sec. 26, of the Constitution of the State of Texas, and *would thereby deny to Intervenor due process of the laws as guaranteed by the 5th and 14th Amendments to the Constitution of the United States.* See *Dewberry v. State*, 283 S. W. (2) 399 (italics supplied)

"(2) The Court of Criminal Appeals has authority to issue such a writ to enforce, but only to enforce, its jurisdiction. Ex parte *Rubison*, 340 S. W. (2) 815 (1960); Ex parte *Minor* 27 S. W. (2) 805; Ex parte *Newsom*, 143 S. W. (2) 956; *Hogan v. Turland*, 430 S. W. (2) 720, no writ history; Ex parte *Martinez*, 145 S. W. 959; Ex parte *Hageler*, 28 S. W. (2) 550. *Cf.*, *State v. Jones*, 395 S. W. (2) 612.

Filed in
Court of Criminal Appeals
Mar 22 1971
Glenn Haynes, Clerk

"The Court, under the guise of reforming a sentence, can not make an order which would be in effect pronouncing a sentence. *Meadors v. State*, 260 S. W.

580. The Court has no responsibility in fixing punishment except to see that it was within the power of the jury to assess it. Harvey v. State, 201 S. W. (2) 42. Unless a sentence is pronounced validly by the District Court, the Court of Criminal Appeals has no jurisdiction over the case.

"(3) Jurisdiction to sentence or resentence is given only to the District Court. Article 42.03 of the Code of Criminal Procedure expressly gives jurisdiction to resentence, after issuance of the mandate of the Court of Criminal Appeals, to the District Court. The jurisdiction given by said Article is not to perform a ministerial function but to exercise judicial discretion, find the facts, and subtract at the very least the time spent in jail pending appeal. Ex parte *Griffith* (Tex. Cr. Ap.) 457 S. W. (2) 60. According to *North Carolina v. Pearce*, 395 U. S. 711, 89 S. Ct. 2072, the time subtracted must be all of the time in jail, and credit "for punishment already endured" must be fully subtracted. 89 Sup. Ct. 2072, 2077. The time subtracted must also include time "credited for good behavior." (89 Sup. Ct. 2077, footnote 13, recognized by Judge Onion in *Bennett v. State*, at 450 S. W. (2) 652-657.

"We think that the Statutes of Texas so delimit the jurisdiction of the Court of Criminal Appeals that it does not have jurisdiction to resentence Pruett, and therefore it does not have jurisdiction to enter the additional credit for good conduct required by the Supreme Court in *Pearce*. What Court then has jurisdiction? Only the District Court, because the Constitution of Texas gives the District Court general jurisdiction "over all causes of action *whatever* for

which a remedy or jurisdiction is not provided by law or this Constitution . . ." This is the exact language of the Texas Constitution, Article 5, Section 8.

"(4) We are mindful of *State v. Klein*, 224 S. W. (2) 250; Ex Parte *Massie*, 278 S. W. (2) 851; and State, ex rel *Wilson v. Briggs*, 351 S. W. (2) 892. Such cases involved *suspension* of the sentences imposed by this Court through affirmance, and thus interference with the jurisdiction of this Court. But Judge Clawson made no attempt to suspend the previous sentence. He simply subtracted the credits which in his judicial opinion were proper. To do this he exercised fact-finding jurisdiction, which this Court does not have. To do this, he obeyed the mandate of *Pearce* and *Ex Parte Griffith*. See Judge Onion's opinion in the latter case at 457 S. W. (2) 64, where he said: "Here the procedure does not involve merely granting credit on the sentence, but calls for the defendant to be again brought before the trial court to be re-sentenced with the judge actually subtracting from the original sentence the time the defendant has lain in jail pending the appeal."

"Judge Clawson therefore did not interfere with the jurisdiction of this Court; he followed the mandate of the Statute. We think he erred in not crediting presentence time; the Statute does not prevent or prohibit a District Judge from so doing, especially if constitutional reasons are present. See note 3, Ex Parte *Griffith*, 457 S. W. (2) 65.

2.

"Judge Clawson properly discharged Pruett, after allowing the proper credits, because:

"(1) Not to discharge Pruett after recognizing that the sentence was served would have constituted an abdication from Judge Clawson's duty under Article 5, Section 8, of the Constitution, and would have meant that the State was exacting vengeance, rather than punishment. We think that is what the State is trying to do now—exact vengeance. Everyone knows that the boy has served longer than he would have had to serve in the Pen. Does the State simply want to put the boy to the stigma of a day or two inside the facilities of the Department of Corrections?

"If the State says that only the Department of Corrections or some officer under Article 6184 l could judge the time for good conduct, it meets itself coming back. Its officers were not in charge of the jail, and could not testify to conduct or bad conduct. Only the Sheriff could testify on this. He did, and the only judicial officer empowered by the laws of Texas to hear his testimony was Judge Clawson, or an assigned District Judge.

"(2) Article 5118a requires a credit of 1/3 of the time for good conduct. This applies, the way the statute is written, to "inmates of each county jail." Such statute does not exclude felons. Article 6184 l grants 20 days per month for Class 1 prisoners, and ten days per month for all Class II prisoners. Credit under either theory under either statute would grant Pruett sufficient time to require his release. Both statutes require that a card or ledger be kept together with a calendar card showing all forfeitures of commutation of time and *reasons* therefor.

'No card and no ledger was kept of Johnnie Pruett,

and therefore it must be conclusively presumed that "no charge of misconduct" was sustained against him. We found no Texas case on this point, but the authorities outside of Texas are clear, and apparently without conflict, that such presumption of good conduct *must* be indulged, and that parol evidence of misconduct is inadmissible. 72 C.J.S. 886. Such was the exact holding in two Tennessee cases, *Gilliam v. State* (Tenn. 1939) 126 S. W. (2) 305, and *State v. McLellan*, 9 S. W. 233.

"Insofar as it may be argued that the Sheriff's statutory authority under Article 5118a to deny commutation is discretionary with him, we reply that such *construction is to impute an unconstitutional delegation of legislative power to him.* This was the exact holding in *Fite v. State* (Tenn. 1905) 88 S. W. 941. And it is settled in Texas that the Legislature can not delegate its power without at the same time setting up some reasonable standard for the administrator to follow: 53 Tex. Jur. (2) 66; 12 Tex. Jur. (2) 406; 12 Tex. Jur. (2) 410; 1 Tex. Jur. (2) 651. (italics supplied)

"The legislator must fix a reasonable standard for the administrator to follow: *Southwest Savings & Loan v. Faulkner* (Tex. Sup. Ct.), 331 S. W. (2) 917; *Nichols v. Dallas*, 347 S. W. (2) 326. Standards were set for the Sheriff, but he did not follow them.

"Article 6184 l requires the credit set forth therein and says it "shall" be allowed. The fact that Article 5119a uses the word "may" must be ignored, because to allow unlimited discretion is to allow an invasion of legislative powers, and "may" *must also be ignored*

for constitutional reasons. It would deny the equal protection clause of the United States Constitution to say that felons in the pen must be granted credits, but that felons in county jail need not be. Likewise, it would be unconstitutional argument to say that Johnnie Pruett has been neither fish nor fowl because he is not in the penitentiary and he is not in the class of county jail inmates contemplated by Article 5118a. (italics supplied). Such was the holding in *Gilliam v. State* (Tenn. 1939), 126 S. W. (2) 305, where the offense was a felony but the trial judge in his discretion sentenced the prisoner to the County Workhouse, as the statute permitted. If the prisoner had been sent on to the Pen he would have received credits under the penitentiary code. The workhouse statute did not provide for record keeping, as did the penitentiary statute. The Court held that the prisoner's right to credit could not be defeated by sending him to the workhouse, and that the statute providing for credits was a part of his sentence, and, furthermore, that the failure of the county workhouse administrator to keep records, saying whether the prisoner had shown good conduct, or bad conduct, did not prevent the court, in the absence of such records, from presuming that the conduct was good.

"The Courts construe the statutes if possible as entitling a prisoner to commutation as a matter of right, and not as a favor. 41 Am. Jur. 916. Where statutes on the subject are capable of two constructions, that construction is favored which would entitle the prisoner to release and discharge at the earliest possible time. 72 C. J. S. 886.

"(3) In aid of the validity of Judge Clawson's order,

we say that the pre-sentence time should have been credited. Judge Clawson did not do this, out of deference to the trial judge who entered the original order which allowed credit of pre-sentence time only back to July 25. *However, under the rule of the Pearce case, and Robinson v. Beto, 426 F (2) 797, surely the pre-sentence time was punishment which constitutionally must be credited.* (italics supplied) It is playing with words, it is making a distinction without a difference, to distinguish between pre-sentence time and post-sentence time. The reasoning behind both of the cases just mentioned is that to leave it discretionary with the judge whether jail time will be subtracted is to deter a defendant from appealing out of fear that it will cost him time if his appeal is unsuccessful; and that such deterrence is a denial of due process. It is just as unfair for the trial judge to deny pre-sentence as post-sentence time. Once pre-sentence time is denied the defendant is impeded in the free choice of making an appeal because he knows that his total time is already not to be credited, and that it may better behoove him to forego an appeal in the hope of more quickly getting a parole or otherwise being discharged from the Penitentiary.

"Judge Onion may well have had this in mind. See footnote 3 at 457 S. W. (2) 66. In this connection, we would point out that *Gremillion v. Henderson*, 425 F (2) 1293, cited by Judge Onion in said footnote was decided a few days prior to *Robinson*, and it did not involve the situation of an appeal, so that deterrence of an appeal was not possibly involved.

"It is only reasonable to say that denial of pre-sentence time deters an appeal because the prisoner looks

forward with real fear that he may have to spend more time in jail with an appeal than without it; *this is the thing declared unreasonable in Robinson, and also unconstitutional where the Court said: "defendant's right of appeal must be free and unfettered."* (426 F. (2) 798). *Pearce says "punishment already endured must be fully subtracted."* 89 S. Ct. 2072, 2077. (italics supplied)

"We respectfully disagree with Judge Onion's statement in *Bennett v. State*, 450 S. W. (2) 652, 657 that the *Pearce* case refers only to time in *prison*. We respectfully submit that to the public and to the prisoner it makes no difference whether the incarceration is prior to the sentence because the prisoner can not make bond, or whether it is after the sentence.

"Alternative Plea for Relief Here

In the event that the Court feels here that we are wrong and that Judge Clawson should not have entered the Order of discharge; we respectfully ask the Court of Criminal Appeals to enter an order now of discharge. If the Court of Criminal Appeals has jurisdiction, and if Judge Clawson did not, the same arguments under statutory and constitutional law, which we have made in the foregoing pages, we humbly submit, compel the discharge of the prisoner. (italics supplied)

"WHEREFORE, Intervenor prays that the Petition for Writ of Prohibition be dismissed or denied, and in the alternative that the Court here order that Pruett's

liberty be left unimpaired and that he be declared legally free, and for general relief.

Burrell Johnston
108 Nueces
Austin, Texas 78701

Stayton, Maloney, Black, Hearne
& Babb
By Frank Maloney
Capital Nat. Bank Bldg.
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David L. Tisinger
404 First National Life Building
Austin, Texas 78701

ATTORNEYS FOR INTERVENOR

A True Copy

Attest:

Glenn Haynes, Clerk
Court of Criminal Appeals of Texas
By Tony Bennett
Deputy

"No. 44,043

"IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

"STATE OF TEXAS ex rel
LESLIE B. VANCE, DISTRICT ATTORNEY
52ND JUDICIAL DISTRICT
CORYELL COUNY, TEXAS, RELATOR

VS

J. F. CLAWSON, JR., JUDGE
(Sitting for the 52nd Judicial District Court)

"APPLICATION BY JOHNNIE PRUETT

FOR STAY OF WRIT OF MANDAMUS AND ANY OTHER PROCEEDINGS HEREIN EXCEPT TO DIRECT RESPONDENT TO WITHHOLD ISSUING ANY CAPIAS OR OTHER PAPER PENDING APPLICATION BY PRUETT FOR RELIEF IN FEDERAL COURTS

"TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Now comes Johnnie Pruett and moves the Court to stay any enforcement of its Order of March 31, 1971, and to direct Respondent J. F. Clawson to take no steps toward issuance of any capias or other writ against Johnnie Pruett, pending allowance of thirty

days for Johnnie Pruett to appeal to the United States Supreme Court, the District Court for the Western District of Texas, and the United States Circuit Court of Appeals for the Fifth Circuit, if necessary, and pending applications for appropriate stays in such Courts of this Court's Order of March 31, 1971, and in support hereof shows:

"*This Honorable Court has denied said Johnnie Pruett his rights under the First, Fifth and Fourteenth Amendments, U. S. Constitution, in that:*

"*First:* This Honorable Court has denied *procedural due process to Johnnie Pruett, attempted Intervenor and Amicus Curiae, in:* (italics supplied)

"(a) Setting this case for hearing without any notice to Pruett only 5 days after the filing of the Petition by Relator, with two of such 5 days being holidays;

"(b) In overruling Pruett's Motion to Intervene;

"(c) In overruling Pruett's Motion for Postponement;

"(d) In allowing Pruett's attorneys to appear only as Amicus Curiae, and in allowing them only ten minutes to argue the grave constitutional questions involved;

"(e) In allowing the State to Appeal by this means the Order of Judge J. F. Clawson, dated March 8, 1971, in Cause No. 6522 in the 52nd Judicial District Court of Coryell County Texas

Second: *This Honorable Court has denied substantive due process and the equal protection of the laws in destroying Pruett's vested liberty, and subjecting him to double jeopardy.* (italics supplied)

Third: *This Honorable Court has denied substantive due process, the equal protection of the laws, and civil rights to Johnnie Pruett, by refusing to allow him credit for all his time in jail, by basing such refusal on an interpretation of Artitle 5118 a, whilst at the same time refusing to recognize that Article 6184 l would require an equal credit,* under *North Carolina v. Pearce*, 395 U. S. 711, and *Robinson v. Beto*, 426 Fed. (2) 797. (italics supplied)

Fourth: *This Honorable Court has denied equal protection of the laws by refusing to allow the exercise of judicial discretion by Judge Clawson.*

"Relief will be sought in Federal Courts immediately, but immediate enforcement by this Court will make matters partially moot.

"Johnny Pruett here humbly beseeches the Court that at least he should be entitled to present the questions here involved to the Federal Courts; such will not hurt anyone. In fact, it may be helpful to the jurisprudence of Texas.

"WHEREFORE, Johnny Pruett, Amicus Curiae, and the undersigned attorneys most respectfully pray

that all action in this case be stayed for thirty days pending efforts to get this case heard by the Federal Courts, except that Respondent Clawson should be instructed to hold up the issuance of any capias or the taking of any action looking toward the arrest of Johnny Pruett, pending said thirty day period.

Burrell D. Johnston
1108 Nueces
Austin, Texas 78701

Stayton, Maloney, Black, Hearne & Babb
By Frank Maloney
Capital National Bank Bldg.
Austin

David L. Tisinger
404 First National Life Bldg.
Austin, Texas

Attorneys for Johnnie Pruett

STATE OF TEXAS
COUNTY OF TRAVIS

Before me, the undersigned authority, on this day personally appear David L. Tisinger, who, being of me duly sworn, upon his oath deposed and said that the facts stated above are true.

David L. Tisinger

Sworn to and subscribed before me this the 31st day of March, 1961, to certify which witness my hand and seal of office.

Betty Slaughter
Notary Public Travis County, Texas

APPENDIX C

"No. 6522

"THE STATE OF TEXAS
v
JOHNNIE PRUETT

IN THE DISTRICT COURT
OF CORYELL COUNTY
52ND DISTRICT

"MOTION OF DEFENDANT FOR RESENTENCING AND FOR PROPER CREDIT UPON HIS TIME IN JAIL

"TO THE HONORABLE JUDGE OF SAID COURT:

"Now comes the Defendant, Johnnie Pruett, and moves for resentencing pursuant to Art. 42.03, 42.09 and related sections of the Code of Criminal Procedure, and shows unto the Court:

1.

"Defendant has been continuously in County Jail in this County of Coryell since April, 1969, and, since his original sentence herein in July 1969 he has not only been continuously in such jail but has been appealing his conviction herein to the Court of Criminal Appeals;

2.

"His case is now on appeal to the Supreme Court of

the United States, being Cause No. 1390, styled Pruett v. The State of Texas.

3.

"However, pending the appeal to the U. S. Supreme Court, it may be that a mandate of affirmance of Defendant's conviction will shortly issue from the Court of Criminal Appeals; and, in anticipation of such mandate, Defendant moves for re-sentencing and credit of his jail time pursuant to the above statutes, *and pursuant to the doctrines of Robinson v. Beto, 426 Fed. (2) 797 (1970) and Ex parte Griffith, 457 S. W. (2) 60 (Ct. Cr. App. Tex. 1970), shows that he has a constitutional right to credit of his jail time.* (italics supplied)

4.

"Defendant says that the Court should direct the Sheriff to bring Defendant before the Court for this re-sentencing and that the Sheriff should be required to disclose the amount of Defendant's jail time for the record.

5.

"Defendant says, that in all equity, in view of the fact that he has been in jail nearly 22 months, and his sentence is only 24 months, the Court should release Defendant on his own recognizance or allow Defendant to serve out his term on week-ends, or that he have his sentence reduced and discharged.

"Wherefore, Defendant prays that he be brought

before the Court for re-sentencing, that his jail time be credited upon the mandate and commitment, and in the alternative that he be released on his own recognizance to serve out his term on week-ends, or that he have his sentence reduced and that he be discharged, and for general relief under the statutes of the State of Texas.

David L. Tisinger
404 First National Life Building
Austin, Texas 78701
Attorney for Defendant
No. 6522

"THE STATE OF TEXAS
VS
JOHNNIE PRUETT

IN THE DISTRICT COURT
CORYELL COUNTY, TEXAS
52ND JUDICIAL DISTRICT

"DEFENDANT'S MEMORANDUM BRIEF ON MOTION FOR RESENTENCING AND DISCHARGE

TO SAID HONORABLE COURT:

"The following authorities are informally submitted.

Credit for Defendant's Jail Time Should Be Allowed 100%.

"*North Carolina v. Pearce*, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. (2d) 707

Robinson v. Beto, 426 F (2d) 797 (1970)
Ex Parte Griffith (Tex. Cr. App.), 457 S. W. (2) 60
Bennett v. State (Tex. Cr. App.) 450 S. W. (2) 652

"In the *Pearce* case, just cited above, *the Supreme Court of the United States said that credit must be given "for punishment already endured"; and that such must "be fully subtracted." 89 Sup. Ct. 2072, 2077. The Court in that case also said that the time subtracted must also include the time "credited for good behavior."* (italics supplied)
"In the *Robinson* case, cited above, it was specifically held that credit must be given for time in jail pending appeal; and Judge Onion in the *Griffith* case, cited above, followed the *Robinson* case and held that the effect of the *Robinson* case was to destroy the trial court's discretion under Article 42.03 as to granting credit for time in jail pending appeal, and that *Robinson* means such credit must be given by subtracting from the total time given in the sentence. (457 S. W. (2) 65)
"The reasoning behind both the *Robinson* and *Griffith* cases is that to leave it discretionary with the judge whether jail time will be subtracted is to deter a defendant from appealing out of fear that it will cost him time if his appeal is unsuccessful, and *that such deterrence is a denial of due process.* (italics supplied)

"It is likewise an unfair situation if the trial court has discretion to deny part of the pre-sentence jail time. Once it is denied the defendant is impeded in the free choice of making an appeal because he knows that his total time is already

not to be credited and that it may better behoove him to forego an appeal in the hope of more quickly getting a parole or otherwise being discharged from the Penitentiary.

"Judge Onion recognized that such might well be the case, because he pointed out in his opinion in *Griffith* (footnote 3 at 457 S. W. (2) 66) as follows: "It is conceivable, however, that trial judge's discretion as to granting credit for presentence custody could be employed in such manner as to deter an accused's right of appeal. *If it is, then a constitutional question may well be presented.*" (italics supplied)

"In this connection, we would point out that the *Gremillion v. Henderson* case (425 F. (2) 1293) was decided a few days prior to *Robinson* and it did not involve the situation of an appeal, so deterence of appeal was not possibly involved, and the *Gremillion* case was the only basis for Judge Onion's observation that *Robinson* did not affect the discretion of the trial court as to presentence time.

"Surely Judge Onion was impressed with the point that a defendant who is denied credit for pre-sentence time in custody may well be deterred from appealing because he would naturally figure that the time on appeal, plus the time of pre-sentence custody, would add up to more time than he would have to spend in custody if he forewent the appeal and went immediately to the penitentiary and took his credit for good conduct. (In Pruett's case here, with a two-year sentence, he could have been released in 14 months. He has

already spent 22 months in jail.) Therefore, it is reasonable to say that denial of pre-sentence time is calculated to discourage appeal almost as much as denial of appeal time; *and that is the thing declared unconstitutional in Robinson, where the Court said: "defendant's right of appeal must be free and unfettered."* (426 F. (2) 798) (italics supplied)

"Furthermore, Article 42.03 certainly does not prohibit the trial court from in his discretion crediting pre-sentence time after appeal.

"And again, the the rule of *Pearce* requires that pre-sentencing time must be credited. For, "punishment already endured must be fully subtracted." 89 S. Ct. 2072, 2077.

"Mandatory Credit for Good Conduct, added to jail time, Now Requires Discharge.

"Article 5118a requires a credit of 1/3 of the time for good conduct. This applies, the way the statute is written, to "inmates of each county jail." Such statute does not exclude felons. Article 6184 l grants 20 days per month for Class I prisoners, and ten days per month for all Class II prisoners. Credit under any theory under either statute would grant Pruett sufficient time to require his release. Both statutes reqquire that a card or ledger be kept together with a calendar card showing all forfeitures of commutation of time and reasons therefor.

"No card and no ledger was kept on Johnnie Pruett, and therefore it must be conclusively presumed that "no charge of misconduct" was sustained against him.

We found no Texas case on this point, but the authorities outside of Texas are clear and apparently without conflict that such presumption of good conduct must be indulged, and that parol evidence of misconduct is inadmissible. 72 C. J. S. 886. Such was the exact holding in two Tennessee cases: *Gilliam v. State* (Tenn. 1939) 126 S. W. (2) 305, and *State v. McLellan*, 9 S. W. 233.

"Insofar as it may be argued that the Sheriff's statutory authority under Article 5118a to deny commutation is solely discretionary with him, we reply that such a construction *is to impute an unconstitutional delegation of legislative power to him. This was the exact holding in Fite v. State* (Tenn. 1905) *88 S. W. 941. It is settled in Texas that the Legislature can not delegate its power without at the same time setting up some reasonable standard for the administrator to follow: 53 Tex. Jur (2) 66; 12 Tex. Jur 406; 12 Tex. Jur (2) 410; 1 Tex. Jur. (2) 651.* (italics supplied)

"The Legislature must fix a reasonable standard for the administrator to follow: *Southwest Savings & Loan v. Falkner*, (Tex. Sup. Ct.) 331 S. W. (2) 917; *Nichols v. Dallas*, 347 S. W. (2) 326.

"Article 6184 l requires the credit set forth and says it "*shall*" be allowed. The fact that Article 5118a uses the word "may" must be ignored because to allow unlimited discretion is to allow invasion of legislative powers, but "may" must also be ignored for constitutional reasons. *It would deny the equal protection of the laws, within the meaning of the 14th Amendment to the Constitution of the United States, to say that felons must be granted credits but that county*

jail inmates need not be. Likewise, it would be unconstitutional argument to say that Johnnie Pruett has been neither fish nor fowl because he is not in the penitentiary and he is not the class of county jail inmate contemplated by Article 5118a. He is entitled to the equal protection of the laws. (italics supplied) Such was the holding in *Gilliam v. State* (Tenn. 1939) 126 S. W. (2) 305, where the offense was a felony but the trial judge in his discretion sentenced the prisoner to the County Workhouse, as the statute permitted. If the prisoner had been sent to the penitentiary he would have received credits under the penitentiary code. The workhouse statute did not provide for credits and did not provide for record keeping, as did the penitentiary statute. The Court held that the prisoner's right to credit could not be defeated by sending him to the workhouse, and that the statute for credits was a part of his sentence and, furthermore, that the failure of the county workhouse administrator to keep records saying whether the prisoner had shown good conduct, or bad conduct did not prevent the court from presuming, in the absence of such records, that the conduct was good.

"The tendency of the courts seems if possible to construe the statutes as entitling a prisoner to commutation as a matter of right, and not as a favor. 41 Am. Jur. 916. Where statutes are capable of two constructions, that construction is favored which would entitle the prisoner to release and discharge at the earliest possible time. 72 C. J. S. 886.

"*Pruett having already served longer than he presumably would have, had he not appealed, the Court should, at the very least let him complete his sentence*

on week-ends, assuming that the Court does not sustain our positions outlined above, which we believe the Court should.

"We believe that Article 42.03 expressly contemplates this. We urge that this boy, in any event, be now spared the stigma of penitentiary time. Here we appeal to the mercy and discretion of the Court.

Respectfully submitted,

David L. Tisinger
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Austin, Texas 78701
Phone GR 8-8331
Attorney for Johnnie Pruett

FILED
SEP 20 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 70-154

JOHNNIE PRUETT,

Petitioner

v.

THE STATE OF TEXAS, and
J. F. CLAWSON, JR.,

Respondents

PETITIONER'S SUPPLEMENTAL BRIEF

DAVID L. TISINGER
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FIRM FOUNDATION—AUSTIN

INDEX AND TABLE OF CONTENTS

Page No.

Petitioner Successful on Habeas Corpus ---------- 3

Opinion of Judge Suttle ---------- 5

Prayer ---------- 8

CITATIONS

Rules of the Supreme Court:

Rule 24, Par. 5 ---------- 3

Cases:

Allen v. Henderson, 434 F. (2d) 26,27 (5th Cir. 1970) ---------- 7

Baldwin v. Smith, 316 F. Supp. 670 (D. C. Vt. 1970) ---------- 7

Brown v. Allen, 344 U. S. 443, 448 (1953) ---------- 6

Gilliam v. State, 174 Tenn. 388, 126 S. W. (2d) 305, 307 ---------- 7

Grossnickle v. Alabama, 415 F. 2d 864 (5th Cir. 1969) ---------- 7

North Carolina v. Pearce, 395 U. S. 711, 719, n. 13, 724 ---------- 7

Pruett v. State, 463 S. W. (2) 191 (Tex. Crim. App. 1970), app. dismissed, 402 U. S. 902 (1971) ---------- 5

Quick v. Beto, 373 F. 2d 739 (5th Circ. 1967) ---------- 7

Page No.

Robinson v. Beto, 426 F. (2d) 797 (5th Circ. 1970) ---------- 6, 7

Singleton v. Shafer, 313 F. Supp. 1094 (E. D. Pa. 1970) ---------- 7

State v. Clawson, 465 S. W. (2) 964 (Tex. Crim. App., 1971) ---------- 5, 6

Statutes:

Texas Code of Crim. Procedure, art. 44.04 (e) ---------- 6

Revised Civil Statutes of Texas:
Art. 5118a ---------- 6, 7

Art. 6184 *1* ---------- 6, 7

Attorney General's Opinions:

No. C-310 (1964) ---------- 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 70-154

JOHNNIE PRUETT,

Petitioner

v.

THE STATE OF TEXAS, and
J. F. CLAWSON, JR.,

Respondents

PETITIONER'S SUPPLEMENTAL BRIEF

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Petitioner, Johnnie Pruett, begs leave to file this supplemental Brief. Rule 24, par. 5.

PETITIONER SUCCESSFUL ON HABEAS CORPUS

Unable to obtain stays, and failing to obtain an in-

junction, preventing enforcement of the Order of the Court of Criminal Appeals, Petitioner was reincarcerated after the filing of his Petition for Certiorari herein.

After extensive hearings before the Honorable Judge D. W. Suttle in the United States District Court for the Western District of Texas, Petitioner was granted release from custody, on his Petition for Writ of Habeas Corpus, by said District Court. *The case is not moot, because the State is appealing the District Court's judgment.*

In order to advise the Supreme Court of recent developments in this case, and because the Opinion of Judge Suttle in the habeas matter, rendered August 24, 1971, so clearly and with such masterly skill states the law on the issues involved, we respectfully copy same now verbatim, and urge the principles and authorities therein expressed and cited as our Supplemental Brief.

This Opinion, written with a facile pen and remarkable for its insight and concise treatment, follows:

OPINION OF JUDGE SUTTLE

"UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

"JOHNNIE PRUETT		
v.	}	A-71-CA-50
STATE OF TEXAS, ET AL		

"ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

"After affirmance of his conviction for sodomy, *Pruett v. State*, 463 S.W.2d 191 (Tex.Cr.App. 1970), *app. dismissed*, 402 U.S. 902 (1971), petitioner applied to the convicting Court for and received credit on his 2 year sentence for time spent in jail pending appeal and good-time credit of 1/3 time served, and was ordered released. Upon application of the State for extraordinary relief, the Texas Court of Criminal Appeals held that the convicting Court was not empowered by State law to grant good-time credit, and ordered petitioner reincarcerated. *State v. Clawson*, 465 S.W. 2d 964 (Tex.Cr.App. 1971). Petitioner filed the instant petition, contending that such credit is required by the 14th Amendment to the United States Constitution.

"In presenting his claim to the convicting Court and the highest appellate Court in the State, petitioner has exhausted his State remedies. *Brown v. Allen*, 344 U.S. 443, 448 (1953). The constitutional questions here raised regarding the State statutory scheme as interpreted by those Courts is properly before this Court, and the Motion to Dismiss is, in all things, DENIED, and IT IS SO ORDERED.

"Since petitioner appealed his felony conviction and could not post bond, he was committed to jail pursuant to Tex. Code Cr. Pr.* art. 44.04(e), and thus, apparently, was not entitled to consideration under the statute providing good-time credit for penitentiary prisoners. Tex. Rev. Civ. Stat. Ann. art. 6184 *1* (1970). However, since he was in jail under a penitentiary sentence, he was not entitled to consideration under the State statute providing good-time credit for county jail prisoners. Tex. Rev. Civ. Stat. Ann. art. 5118a (1971); *State v. Clawson*, *supra*; Tex. Att'y Gen. Op. No. C-310 (1964). Thus, because he appealed his conviction, petitioner, under the relevant State statutes as construed by its Courts, was excluded from consideration for good-time credit otherwise afforded both misdemeanor and felony prisoners who do not appeal. Such a result is constitutionally impermissible.

"The Court of Criminal Appeals correctly held that petitioner was entitled to credit toward his final sentence for time spent in custody pending appeal. See *Robinson v. Beto*, 426 F.2d 797 (5th Cir. 1970). But to fully insure that the State's appellate avenues are

*By clerical error cited in Opinion as Penal Code Ann.

free from unreasonable distinctions that impede open and equal access to the Courts, this credit must be complete and full. *North Carolina v. Pearce*, 395 U.S. 711, 719 n.13 (1969); *Allen v. Henderson*, 434 F.2d 26, 27 (5th Cir. 1970). While the State need not provide good-time credit at all, *Singleton v. Shafer*, 313 F.Supp. 1094 (E.D.Pa. 1970), and if provided may administer it with discretion, See *Quick v. Beto*, 373 F.2d 739 (5th Cir. 1967); *Grossnickle v. Alabama*, 415 F.2d 864 (5th Cir. 1969), it may not create *de facto* classification unjustified in terms of governmental purpose, *Baldwin v. Smith*, 316 F.Supp. 670 (D.C. Vt. 1970), or which impedes avenues of appellate review. *North Carolina v. Pearce, supra* at 724; *Robinson v. Beto, supra.* The result of the instant statutory scheme, which denies petitioner consideration for good-time credit available to other prisoners because he appealed his conviction, creates both an unjustified classification and unreasonable impediment to appellate review of criminal convictions, and hence violates petitioner's rights under the 14th Amendment to the United States Constitution.

"Petitioner must therefore be considered for good-time credit as would other State prisoners. Since both of the pertinent statutes provide for 1/3 credit for time served, a choice between them for computation need not be made. Supra art. 5118a, 6184 *1*. Furthermore, since the conduct record required under both statutes has not been kept and there is no evidence of any "sustained charge of misconduct," *ibid.*, petitioner must be credited with the time found due him by the convicting Court. See *Gilliam v. State*, 174 Tenn. 388, 126 S.W.2d 305, 307 (1939).

"The Petition for Writ of Habeas Corpus is therefore, in all things, GRANTED, and Respondents shall release petitioner from further custody in relation to the instant sentence, and IT IS SO ORDERED.

"Entered this 24th day of August, 1971.

D. W. SUTTLE
United States District Judge"

PRAYER

Petitioner prays that the Writ be granted, or that the Court summarily enter judgment discharging Petitioner, and for general relief.

Respectfully submitted

DAVID L. TISINGER
402 First National Life Building
Austin, Texas 78701
Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NO. 70-154

JOHNNIE PRUETT,

Petitioner

v.

THE STATE OF TEXAS AND J. F. CLAWSON, JR.

Respondents

BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
ARGUMENT AND AUTHORITIES	6
I. Was procedural due process denied petitioner by the Court of Criminal Appeals refusing to allow him to intervene in this mandamus action?	6
II. Was petitioner denied any constitutional right when he was denied eligibility for good time credit while in the county jail awaiting appeal?	8
CONCLUSION	12
CERTIFICATE OF SERVICE	13

CITATIONS

CASES Page

Ex parte Baird, 228 S.W.2d 511 (Tex. Crim. 1950) 9

Baxstrom v. Herold, 383 U.S. 107 (1966) 10

Ex parte Griffith, 457 S.W.2d 60 (Tex. Crim. 1970) 7

Honeyman v. Hanan, 300 U.S. 14 (1937), app. dism. 302 U.S. 375 (1937) 3

Ex parte Johnson, 311 S.W.2d 861 (Tex. Crim. 1958) 9

North Carolina v. Pearce, 395 U.S. 711 (1969) 10

Pruett v. State, 463 S.W.2d 191 (Tex. Crim. 1970) 5

Pruett v. State, 465 S.W.2d 164 (Tex. Crim. 1971) 2

State ex rel. Vance v. Clawson, 465 S.W.2d 164 (Tex. Crim. 1971) 5

Walters v. City of St. Louis, 347 U.S. 231 (1954) 3

Ex parte Washburn, 459 S.W.2d 637 (Tex. Crim. 1970) 7

Ex parte Young, 418 S.W.2d 824 (Tex. Crim. 1967) 3

STATUTES AND RULES

Supreme Court Rule 19, par. 1(a) 2

Texas Attorney General's Opinions Nos. C-310 and WW-1326 ..... 4, 9

Vernon's Annotated Texas Civil Statutes, Art. 5118(a) 5, 6, 8, 9

Vernon's Annotated Texas Civil Statutes, Art. 6184(1) 8, 9

Vernon's Annotated Texas Code of Criminal Procedure, Art. 11.07 ..... 3, 4, 6, 8

28 U.S.C., Sec. 1257(3) 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NO. 70-154

JOHNNIE PRUETT,

Petitioner

v.

THE STATE OF TEXAS AND J. F. CLAWSON, JR.

Respondents

BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the State of Texas, Respondent herein, and files this its response to Petitioner's petition for writ of certiorari heretofore filed herein.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas was delivered on March 31, 1971, stating that no motion for rehearing would be entertained. The case is reported at 465 S.W.2d. 164 (Tex. Crim. 1971).

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C., Section 1257(3), and Supreme Court Rule 19, paragraph 1(a). The record in this cause clearly shows that the petitioner's claims herein are based primarily upon the refusal of the Court of Criminal Appeals to allow him to intervene in a mandamus action brought by District Attorney Vance against District Judge Clawson. The record of proceedings and the opinion of the Court of Criminal Appeals in that cause clearly reflect that the primary issues upon which the petitioner relies to show jurisdiction in this Court were not decided by the Court of Criminal Appeals. The basic issue decided by the Texas Court of Criminal Appeals was whether or not a state district judge had the authority, under the statutes of the State of Texas, to order petitioner's discharge, thereby circumventing the mandate of the Court of Criminal Appeals which had remanded petitioner to the custody of the Texas Department of Corrections. The Court of Criminal Appeals was not called upon to, and did not rule upon, petitioner's claim that he was entitled by reason of the equal protection clause of the Fourteenth Amendment to the United States Constitution to credit on his sentence for good conduct time accrued. Further, the statutes of the State of Texas authorize an orderly procedure by

which the petitioner's claims can be litigated in the courts of the State of Texas, which procedure the petitioner deliberately bypassed and has continued to bypass. Article 11.07 of the Texas Code of Criminal Procedure provides a procedure by which the petitioner could present each and every question presented herein pertaining to credit on his sentence for his time served while awaiting the outcome of his appeal to the Texas Court of Criminal Appeals for a decision. This is a remedy which is widely known and widely used in the State of Texas. Grounds for relief must first be presented to the convicting court, but the Court of Criminal Appeals is the only court that can order the petitioner discharged. *Ex parte Young*, 418 S.W.2d 824 (Tex. Crim. 1967).

From an examination of this record, it is obvious that in this cause it was not necessary for the Texas Court of Criminal Appeals to decide any question pertaining to the petitioner's rights under the Constitution of the United States. Since the decision of the Federal question was not necessary to the determination of that cause, it should not now be reviewed by this Court. *Honeyman v. Hanan*, 300 U.S. 14 (1937), appeal dismissed, 302 U.S. 375. Furthermore, since the Teas Court of Criminal Appeals did not decide these issues, this Court should not undertake a review of what was not decided. *Walters v. City of St. Louis*, 347 U.S. 231 (1954).

Since petitioner was afforded an opportunity under the statues of the State of Texas to litigate all issues which he now presents, he was not denied due process of law by refusal of the Texas Court of Criminal Appeals to allow him to intervene in this proceeding.

Respondent respectfully submits that the jurisdictional requirements of this Court have not been satisfied and that no substantial Federal question is presented herein.

QUESTIONS PRESENTED

Respondent does not feel that the questions as detailed by the petitioner in his petition for writ of certiorari are properly before this Court for determination. A sifting through the myriad and multifariously intertwined questions presented by petitioner leaves the respondent to conclude that two primary questions are presented to this Court:

I. Was the petitioner denied due process of law by the refusal of the Texas Court of Criminal Appeals to allow him to intervene in the proceeding before that Court?

II. Is the petitioner entitled to credit on his sentence for good conduct time by reason of the statutes of the State of Texas and the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petinent provisions of the Constitution of the United States and the statutes of the State of Texas are adequately set forth in petitioner's application except for Article 11.07, Texas Code of Criminal Procedure, which is hereinafter set forth in its entirety in Appendix "A", and Texas Attorney General's Opinions Nos. C-310 and WW-1326, which are attached hereto as Appendix "B" and Appendix "C."

STATEMENT OF THE CASE

The petitioner was convicted on July 25, 1969, of the offense of sodomy, in the District Court of Coryell County, Texas, 52nd Judicial District. His punishment was assessed at confinement in the Texas Department of Corrections for a term of two years. This conviction was affirmed on appeal, *Pruett v. State*, 463 S.W.2d 191 (Tex. Crim. 1970), and the mandate of the Court of Criminal Appeals was issued on March 3, 1971, commanding the trial court "to observe the order of our said Court of Criminal Appeals in this behalf and in all things to have it duly recognized, obeyed and executed." On March 8, 1971, the petitioner presented a motion to Judge Clawson, Judge of the 169th Judicial District Court, sitting in the 52nd Judicial District Court of Coryell County by reason of administrative assignment. This motion sought credit upon the sentence for the time which the petitioner had been in jail pending appeal and additional credit upon his sentence under the provisions of Article 5118(a), Vernon's Annotated Civil Statutes of Texas. As a result of this motion and the hearing conducted thereon, the Judge subtracted from the petitioner's two-year sentence the total of 19 months and 14 days. Although the order does not set forth the exact allocation of this time, it apparently is based upon credit for 39 days of pre-sentence custody, 18 months from date of sentence to date of issuance of mandate by the Court of Criminal Appeals and 5 days intervening between date of mandate and the hearing. *State ex rel. Vance v. Clawson*, 465 S.W.2d 164, 166 (Tex. Crim. 1971), footnote 1. Judge Clawson then determined that petitioner was entitled to "good time credit equal to 1/3 of the days actually served in jail in

the amount of 6 months and 24 days" and ordered the petitioner released and discharged from custody. The State of Texas, acting by and through District Attorney Vance, then brought a petition seeking a writ of prohibition against Judge Clawson to enforce the mandate issued by the Court of Criminal Appeals. The petitioner sought to intervene in this prohibition or mandamus proceeding, but leave to do so was denied by the Texas Court of Criminal Appeals. The Texas Court of Criminal Appeals then determined that the trial judge had no authority to grant credit to petitioner under the provisions of Article 5118(a) and to discharge him, and to that extent his order was void. The Court went on to point out that its writ of mandamus would issue requiring the judge to perform the ministerial duty of carrying out the mandate of the Court unless he set aside that portion of the order granting petitioner "good time" credit on his sentence, ordering him arrested, and then carried out the mandate of the Court of Criminal Appeals.

ARGUMENT AND AUTHORITIES

I. Was procedural due process denied petitioner by the Court of Criminal Appeals refusing to allow him to intervene in this mandamus action?

Since the petitioner was indirectly affected as a result of the outcome of the mandamus action, his argument that he was denied procedural due process might carry some ring of validity if this was the only remedy open to him. However, the statutes of the State of Texas clearly provide a procedure by which petitioner's grievances can be determined. Article 11.07, Texas Code of Criminal Procedure (Appendix

"A") sets forth the method by which any person finally convicted of a felony can file an application for writ of habeas corpus in the convicting court which can then make a return of its findings of fact and conclusions of law to the Court of Criminal Appeals, whereupon that Court shall then enter its judgment remanding the petitioner to custody or ordering his release as the law and facts may justify. This statute also provides that "the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner." This method may be used to determine what credit for time on appeal a convicted felon is entitled to. *Ex parte Griffith*, 457 S.W.2d 60 (Tex. Crim. 1970); *Ex parte Washburn*, 459 S.W.2d 637 (Tex. Crim. 1970).

It would then appear that petitioner's claim that he was denied procedural due process is completely destroyed by the showing that he has refused to seek relief along that avenue which has been provided for him. At no time has petitioner presented the constitutional issues which he now raises to the convicting court for a writ of habeas corpus returnable to the Texas Court of Criminal Appeals to determine whether he is entitled to relief. The only thing which the petitioner has been denied in this regard is his right to intervene in an action which was brought for the sole determination of whether or not the trial judge had interfered with the jurisdiction of the Texas Court of Criminal Appeals by ordering petitioner's discharge. Only the Court of Criminal Appeals, and not the district court, has authority to order his discharge.

II. Was petitioner denied any constitutional right when he was denied eligibility for good time credit while in the county jail awaiting appeal?

First of all, it cannot be overly emphasized that respondent's position is that this issue has not been decided by the Texas Court of Criminal Appeals. In the instant proceeding, the Texas Court of Criminal Appeals only decided whether or not the statutes of the State of Texas authorize such credit and whether or not a district judge had the authority to grant such credit and order the petitioner discharged. In light of the statutory construction that such a grant of credit was not authorized and in view of the provisions of Article 11.07, Texas Code of Criminal Procedure, wherein the Legislature of the State of Texas created an exclusive remedy for review of the convictions of all persons in the State of Texas finally convicted of a felony and making such remedy exclusive of any other proceeding, the petitioner has not properly presented this constitutional issue to the Texas Court of Criminal Appeals nor has that Court ruled thereon.

As to the merits of petitioner's contention that the failure to grant credit for good time to a man awaiting the outcome of his appeal constitutes a violation of the equal protection clause of the United States Constitution, it appears that the petitioner fails to make a necessary and proper disinction between "punishment" and "reward." Article 5118(a) provides for the award of good conduct time to county jail prisoners by the sheriff "in order to encourage county jail discipline." Article 6184(l) of Vernon's Annotated Texas Civil Statutes provides for a "reward to be bestowed on prisoners for good conduct . . ." "in order to en-

courage prison discipline . . ." Article 5118(a) applies only to county jail prisoners serving a final conviction for a misdemeanor and places the discretion for the exercise of this credit in the hands of the sheriff and not in the district judge. *State ex rel. Vance v. Clawson*, supra; Texas Attorney General's Opinions Nos. C-810 and WW-1326. Article 6184(l) applies to prisoners convicted of a felony and actually in the custody of the Texas Department of Corrections. *Ex parte Baird*, 228 S.W.2d 511 (Tex. Crim. 1950); *Ex parte Johnson*, 311 S.W.2d 861 (Tex. Crim. 1958).

Since the question has not been litigated below, the record in this cause fails to indicate what purpose the Legislature of the State of Texas had in mind when it enacted the statutes in question. They, of course, serve the obvious purpose set forth in the statutes to encourage discipline and to reward good conduct. Other than this, it can only be surmised that the Legislature intended to make a distinction between those who were finally convicted and those who were not, based upon the premise that only those who were finally convicted would be proper subjects for any attempt at rehabilitation. The encouragement of good conduct for those subject to rehabilitation programs would of course encourage their participation in such programs. At the same time, the Legislature, in its wisdom, might also determine that those persons who are not finally convicted, whether of a misdemeanor or a felony, should not be subject to programs for rehabilitation for the reason that they have obviously not accepted the fact that they were properly convicted, and for the further reason that if they receive punishment of 15 years or less they would be entitled to end their incarceration by making bail. Therefore,

it would appear that there is a valid distinction between the classes of prisoners, and the Legislature has merely failed to offer a "reward" for good conduct to those prisoners who have not been finally convicted. It is therefore obvious that petitioner fails to receive a "reward" for good conduct not by reason of his appeal, but rather by reason of his status as a person not finally convicted; and he suffers no "penalty" merely because he has not reached a status where good behavior is encouraged. Equal protection does not require that all person be treated identically, it merely requires that a distinction have some relevance to the purpose for which the classification is made. *Baxstrom v. Herold*, 383 U.S. 107 (1966).

To hold that failure to offer a reward for good conduct to a prisoner is within the doctrine laid down in *North Carolina v. Pearce*, 395 U.S. 711 (1969), certainly appears to go far beyond the holding in that case. The respondent readily agrees that failure to grant credit for time served, either awaiting appeal or on a prior conviction, would tend to be a punishment which would deny a person free access to the appellate courts. However, it would appear that failure to offer a "reward" for good conduct to a person who is obviously not a good subject for rehabilitation would certainly not be "punishment" within the concept of that theory. Respondent is well aware that this Honorable Court has indicated in *North Carolina v. Pearce*, supra, footnote 13, that credit for punishment already exacted would include time credited during service of the first prison sentence for good behavior. However, this obviously refers to a situation where good time has vested and cannot be taken away by reversal of the conviction, and would not refer to

the instant situation where the petitioner has never become eligible for good time credit.

As the petitioner points out in his supplemental brief filed in this Court, the United States District Court for the Western District of Texas, Austin Division, in Cause No. A-71-CA-50 styled Johnnie Pruett v. State of Texas, et al, entered its order on August 24, 1971, granting a petition for writ of habeas corpus. Petitioner correctly states that this cause is being appealed to the Fifth Circuit Court of Appeals and is not final. It should also be noted that this cause contains exactly the same issues between exactly the same parties as is presently pending before this Honorable Court. Again, the respondent respectfully differs with a number of findings in Judge Suttle's opinion, most particularly his determination that the classification in the instant case was both unjustified and unreasonable. Contrary to his holding, the respondent respectfully contends that good time credit was not available to the petitioner, not because he appealed his conviction but because his conviction was not final. Further, this classification by the Legislature, as heretofore pointed out, is both reasonable and justified under all of the circumstances, and the failure to offer the petitioner a reward does not serve as an unreasonable impediment to appellate review of his criminal conviction.

The respondent also respectfully takes issue with Judge Suttle's finding that the petitioner has exhausted state remedies by presenting his claim to the convicting court and the highest appellate court in the State. Respondent again respectfully points out that the issues presented here were not presented to the

Texas Court of Criminal Appeals and have not been ruled upon by that Court. Since the issue before Judge Suttle is exactly the same as the issue before this Honorable Court, respondent respectfully prays that this Court issue its order consolidating that cause with the present cause for determination by this Court, if this Court determines that it has jurisdiction over the subject matter of this petition.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that this Honorable Court does not have jurisdiction over the matter herein presented by the petitioner. In the alternative, and in the event that this Honorable Court does find that it does have jurisdiction of this cause, the respondent further submits that there is not present in the instant case any substantial Federal question, and therefore no reason exists for granting the writ.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Max P. Flusche, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Brief in Opposition has been served on counsel for the Respondent by depositing same in the United States Mail, postage prepaid, addressed to Mr. David L. Tisinger, 402 First National Life Building, Austin, Texas 78701, on this.....day of October, 1971.

.....

MAX P. FLUSCHE
Assistant Attorney General

APPENDIX "A"

Art. 11.07 Return to certain county; procedure after conviction

After indictment found in any felony case, and before conviction, the writ must be made returnable in the county where the offense has been committed.

After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas. The writ may issue upon the order of any district judge, and said judge may upon presentation to him of a petition for said writ, set the same down for a hearing as to whether the writ should issue, and ascertain the facts, which facts shall be transmitted to the Court of Criminal Appeals with the return of the writ if same is issued after such hearing. Provided further, that should such writ be returned to the Court of Criminal Appeals without all the facts deemed necessary by the Court of Criminal Appeals, said court may designate and direct any district judge or judges of this state to ascertain the facts necessary for proper consideration of the issues involved. When a petition for writ of habeas corpus presented to the judge of the convicting court contains sworn allegations of fact, which, if true, would render petitioner's confinement under the felony conviction illegal, the attorney representing the state in said court and the Attorney General of Texas shall be afforded an opportunity to answer such allegations, and if it appears that there are issues of fact which are material on the question of whether the petitioner is illegally restrained which have not been resolved, the petitioner may be granted a hearing on

such issues of fact and the judge conducting such hearing shall make and file his findings of fact and conclusions of law. It shall be the duty of the official court reporter of the district judge or judges so designated to forthwith prepare a narration of the facts adduced in evidence upon any such hearing and transmit the same, together with the judge's findings of fact and conclusions of law, to the clerk of the Court of Criminal Appeals within ten days of the date of such hearing. And it shall be the duty of the district clerk of the county wherein the writ is issued to make up a transcript of all pleadings in such case and to transmit the same within thirty days to the clerk of the Court of Criminal Appeals. Provided, that upon good cause shown, the time may be extended by the Court of Criminal Appeals for filing of such narration of facts or transcript.

The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal. Upon reviewing the record the court shall enter its judgment remanding the petitioner to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

Upon any hearing by a district judge by virtue of this Act, the attorney for petitioner, and the state,

shall be given at least three full day's notice before such hearing is held.

Amended by Acts 1967, 60th Leg., p. 1734, ch. 659, § 7, eff. Aug. 28, 1967.

APPENDIX "B"

Honorable Vernon D. Adcock
County Attorney
Dawson County
Lamesa, Texas

Opinion No. C-310

Re: Authority of a sheriff to grant commutation of time for good conduct under Article 5118(a), Vernon's Civil Statutes, to a prisoner incarcerated under a sentence for a felony offense, and related questions.

Dear Mr. Adcock:

You request our opinion construing Article 5118(a), Vernon's Civil Statutes, with regard to its application to the facts which you set out in your letter as follows:

> "Prisoner, on his plea of guilty, was found guilty of a felony offense by the District Court, and sentenced to a term of years of not less than two (2) nor more than four (4). Said prisoner was not transferred to the Texas Department of Corrections, but was incarcerated in the County Jail, where he had been a trusty. This arrangement was with the full approval and consent of said prisoner. On July 15, 1964, said prisoner had served three (3) years of his four (4) year sentence."

In light of the facts as set out, you request our opinion on the following questions:

> "(1) Does the Sheriff in charge of the County

Jail wherein prisoner is confined have the authority to commute the time of prisoner's sentence for good conduct under Article 5118(a), Vernon's Civil Statutes of the State of Texas?

"(2) Can Prisoner make application for and receive parole without being transferred to the Texas Department of Corrections?

"(3) Can prisoner make application for and receive a commutation of sentence by the Governor of the State of Texas, with the approval of the Board of Pardons and Paroles, without being transferred to the Texas Department of Corrections?"

In Attorney General's Opinion No. C-144, it was held that sheriffs have the authority to award commutation of time for good conduct, pursuant to Article 5118(a), Vernon's Civil Statutes, to a prisoner serving in jail under a judgment imposing a jail sentence or a fine.

However, this opinion is not directed to the situation which you have outlined, that is, a prisoner incarcerated in the County Jail who is under sentence in a felony case where the punishment imposed was a term of years in the state penitentiary. There is no statutory or other authority permitting a prisoner under a penitentiary sentence to serve such sentence in the county jail; on the contrary, the county authorities are required to deliver such a prisoner to the Texas Prison System (Attorney General's Opinion No. 0-6177). Article 5118(a) can have no application to such a prisoner and to the instant situation. Therefore, while we answer your first question in the affirmative

—a sheriff does have authority to commute the time of a jail sentence for good conduct under Article 5118(a)—his authority extends only to such prisoners who are in his custody under sentence imposing a term to be served in jail or where a prisoner is laying out a fine and not to prisoners sentenced to a term in the penitentiary.

Your second question, "Can a prisoner make application for and receive parole without being transferred to the Texas Department of Corrections," is answered by the Adult Probation and Parole Law of 1957, Article 781d of the Code of Criminal Procedure. Section 12 of Article III of this Act refers to the matter of paroles in the following language:

> "Sec. 12. The Board of Pardons and Paroles created by Article 4, Section 11 of the constitution of this state, shall administer the provisions of this Act respecting determinations of which prisoners shall be paroled from *the Prison system of this state*, the conditions of such paroles, and may recommend the revocation of paroles by the Governor." (Emphasis added)

It is clear that only prisoners confined in the "Prison System of this State" are subject to the terms of the Act and are eligible for parole. Article 6166a-1 of Vernon's Civil Statutes changed the name of the Texas Prison System to the Texas Department of Corrections.

Accordingly, in answer to your second question, we hold that a prisoner must be transferred to the Texas Department of Corrections before he can make application for and receive parole.

With reference to the third question which in substance is "Can a prisoner receive a pardon or commutation of sentence from the Governor with the approval of the Board of Pardons and Paroles without being transferred to the Texas Department of Corrections," we answer such question in the affirmative.

Section 11 of Article IV of the Constitution of Texas gives to the Governor the power to grant reprieves and commutations of punishment and pardons upon the written recommendation and advice of a majority of the Board of Pardons and Paroles under such rules and procedures as the Legislature may prescribe. The Legislature has made no rule or requirement which would prevent a prisoner incarcerated in county jail from receiving a commutation of sentence or a pardon or that would require such prisoner to be transferred to the Texas Department of Corrections before being eligible to receive a pardon or commutation.

SUMMARY

1. A sheriff has authority to award commutation of time for good conduct under the authority of Article 5118(a), Vernon's Civil Statutes, to a person serving time in a county jail under a judgment imposing a jail sentence or a fine. However, this statute has no application to a prisoner incarcerated in county jail under a sentence calling for imprisonment in the penitentiary, and in such case the sheriff cannot make any commutation of the sentence.

2. A prisoner must be transferred to the Texas Department of Corrections before he can make

application for parole.

3. The Governor has the power upon the recommendation and advice of the Board of Pardons and Paroles to commute the sentence of a prisoner whether he be incarcerated in a county jail or in the penitentiary.

Very truly yours,
WAGGONER CARR
Attorney General of Texas

APPENDIX "C"

Honorable Brandon Bickett
County Attorney
Blanco County Courthouse
Johnson City, Texas

Opinion No. WW-1326

Re: Authority of a sheriff to grant one-third commutation of time for good conduct to a jail prisoner who is serving out his fine, and related questions.

Dear Mr. Bickett:

In your letter you asked the following questions:

> "Whether it is legal for the Sheriff in charge of a County Jail to grant one-third commutation of time for good conduct to an inmate or prisoner who is in jail serving out his fine in the same manner as he would grant such commutation of time to an inmate or prisoner who is in jail serving out his jail sentence.
>
> "Also, in this connection, whether the Sheriff in charge has the sole discretionary power to grant such commutation of time, or must he be required to obtain permission or consent of the Judge of the Court in which the prisoner or inmate has been convicted.
>
> "And, further, does the County Judge, or the Sheriff, have charge and control of the collection of a fine assessed by the Judge?"

Your opinion request further advises us that the prisoner in question was charged with the offense of

"unlawfully hunting deer from an automobile," and after pleading guilty was assessed a fine and court costs. Being unable to pay his fine, he then served a portion of his fine in jail until being released by the Sheriff, purporting to act under Article 5118a, Vernon's Civil Statutes.

Article 5118a, V.C.S. reads as follows:

> "In order to encourage county jail discipline a distinction may be made in the term of prisoners so as to extend to all such as are orderly, industrious and obedient, comforts and privileges according to their deserts; the reward to be bestowed on such prisoners for good conduct shall consist of such relaxation of strict county jail rules, and extension of social privileges as may be consistent with proper discipline. Commutation of time for good conduct, industry and obedience may be granted the inmates of each county jail by the sheriff in charge. A deduction in time not to exceed one third (1/3) of the original sentence may be made from the term or terms of sentence when no charge of misconduct has been sustained against the prisoner. A prisoner under two (2) or more cumulative sentences shall be allowed commutation as if they were all one sentence. For such sustained charge of misconduct in violation of any rule known to the prisoner (including escape or attempt to escape) any part or all of the commutation which shall have accrued in favor of the prisoner to that date of said misconduct may be forfeited and taken away by the sheriff. No other time allowance or credits in addition to the commutation of time for good conduct herein provided for may be deducted from the term or terms of sentences."

Article 785, C.C.P. reads:

> "When the judgment against a defendant is for

a fine and costs he shall be discharged from the same:

"1. When the amount there has been fully paid.

"2. When remitted by the proper authority.

"3. When he has remained in custody for the time required by law to satisfy the amount thereof."

In the event the defendant, who has been assessed a fine and cost, refuses or is unable to pay the same, he may "lay out" such fine and costs at the rate of $3.00 per day, until the fine and costs are satisfied. If, after entering the jail and serving one or more days, he is able to raise some money to apply on the fine and costs, he will receive credit on such fine and costs at the rate of $3.00 for each day served, and is only required to pay the balance due in order to secure his release. Art. 793, C.C.P. The punishment assessed against such defendant never consisted of a term in the county jail. He is only there by reason of his failure to pay the fine and costs. His release may be secured at any time by payment of the balance due on the fine and costs, either by himself or paid for him by his friends or relatives. Since his punishment only consists of a fine and costs, to bring him within the provisions of Article 5118a, V.C.S., would be to permit the sheriff to remit a portion of a cash fine, which Art. 5118a does not purport to do. In answer to your first question, we hold that Article 5118a, V.C.S. has no application to a prisoner in the county jail whose sole punishment is a fine and costs, and who is "laying out" the same.

Attorney General's Opinion No. WW-918 states that under Article 5118a, V.C.S.:

> ". . . the sheriff is given the discretion of giving a prisoner a deduction in time even though he has a record of good conduct. This simply means that where a prisoner has an unquestioned good conduct record, the sheriff is not under a duty to release him in less time than called for in the sentence. . . ."

The sheriff is the custodian of prisoners in the county jail. Art. 265, C.C.P. Art. 5118a, V.C.S. was enacted to assist the sheriff in maintaining proper discipline in the jail. We hold, therefore, in answer to your second question, that the sheriff has the sole discretion under Art. 5118a, V.C.S. in granting commutation of time of those prisoners in his custody serving jail terms in the county jail. The judge of the court in which the prisoner was convicted has no powers or authority under Art. 5118a, V.C.S.

Art. 1616, V.C.S. reads:

> "An account shall be kept with the sheriff charging him with *all* judgments, *fines*, forfeitures and penalties, *payable to and rendered in any court of the county*, the collection of which he is by law made chargeable. The sheriff may free himself from liability from such charge, by:
>
> "1. Producing the receipt of the county treasurer showing the payment of such judgment, fine forfeiture or penalty.
>
> "2. Showing to the satisfaction of the commissioners court that the same cannot be collected, or that the same has been discharged by imprison-

ment or labor, or by escape, without his fault or neglect, and obtaining an order from said court allowing the same."

In *Bradley v. State*, 56 S.W. 114 (Civ. App., 1900, error refused), the Court permitted recovery from a former sheriff and his bondsmen for fines and costs assessed against defendants in the county court, which it was alleged that the sheriff had wilfully neglected and refused to collect. The Court reviewed Articles 838 and 839, Revised Statutes of 1895 (now Article 1616, V.C.S.), and stated at page 116:

> "... The county judge had no authority to direct the release of the parties without a discharge of the judgments against them in one of the modes provided by law. The power to remit fines is given by law to the governor alone. . . . These provisions of the Revised Statutes as well as of the Code of Criminal Procedure were enacted for the purpose of compelling the sheriff to do his duty in the collection of fines, and were made plain to meet just such cases as the present. . . ."

Attorney General's Opinion No. 0-3262 (1941) states:

> "You are respectfully advised that it is the opinion of this department that you should ordinarily look to the sheriff or constable as the case may be for the collection of fines and costs in misdemeanor cases."

In answer to your third question, we hold that the sheriff is charged with the collection of fines assessed in the county court.

SUMMARY

Art. 5118a, V.C.S., which authorizes a sheriff

to grant commutation of time to prisoners in the county jail for good conduct, has no application to a prisoner whose sole punishment consists of a fine and costs, and who is laying out the same in jail.

The sheriff has the sole discretion under Art. 5118a, V.C.S. in granting commutation of time of those prisoners in his custody serving jail terms in the county jail.

The sheriff is charged with the collection of fines assessed in county court.

Yours very truly,

WILL WILSON
Attorney General of Texas

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 70-154

JOHNNIE PRUETT,

Petitioner

v.

THE STATE OF TEXAS, and
J. F. CLAWSON, JR.,

Respondents

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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INDEX

Page

THE COURT HAS JURISDICTION OF THE QUESTIONS PRESENTED BECAUSE SAME WERE URGED BEFORE COURT OF CRIMINAL APPEALS 2

ARGUMENT AND AUTHORITIES 16

I. Procedural due process was denied petitioner by the Court of Criminal Appeals refusing to allow him to intervene in this mandamus action. 16

II. Petitioner was denied constitutional rights when he was denied eligibility for good time credit while in the county jail awaiting appeal. 17

CONCLUSION 18

CITATIONS

Page

Cases:

Ex Parte Anderson, 192 S. W. (2) 280 (Tex. Cr. App.) 1946 ---------- 17

Baldwin v. Smith, 316 F. Supp. 670 (D. C. Vt. 1970) ---------- 17

Bennett v. State, 450 S. W. (2) 652 ---------- 13

Bowen v. Johnston, 306 U. S. 19, 27 ---------- 15

Brown v. Allen, 344 U. S. 443 ---------- 15

Fay v. Noia, 372 U. S. 391 ---------- 15

Gilliam v. State (Tenn. 1939) 126 S. W. (2) 305 ---------- 12, 13

Ex Parte Griffith, 457 S. W. (2) 60 ---------- 13

North Carolina v. Pearce, 395 U. S. 711, 719, n. 13 ---------- 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13

Roberts v. Lavallee, 389 U. S. 40 ---------- 15

Robinson v. Beto, 426 Fed. (2) 797 ---------- 2, 3, 6, 7, 11

Statutes:

Art. 28 U. S. C., Sec. 2254 (b) ---------- 16

Revised Civil Statutes of Texas;
Art. 5118 a ---------- 5, 10

6184 l ---------- 5, 10, 12

Texas Code of Criminal Proc. Art. 11.07 ---------- 15

CITATIONS (Continued)

Page

Texts:

Antieau, Modern Constitutional Law, 1969, 397-400, 562-650 (Vol. 1) ---------- 18

Sokol, Federal Habeas Corpus, Second Ed., 159-176 ----15, 16

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the Petitioner, Johnnie Pruett, and files this Reply to the Brief in opposition, filed by the State of Texas.

The Court Has Jurisdiction of the Questions Presented Because Same Were Urged Before the Court of Criminal Appeals

By brief, hereinbefore filed, Respondent Clawson has substantially agreed with Petitioner. However, the Respondent the State of Texas now questions jurisdiction here on a basis which, we think, indicates that it is unfamiliar with the record. It says the questions here presented were not presented to the Court of Criminal Appeals. The truth is that such questions were presented and emphatically urged—and fairly urged.

Respondent Clawson, even, urged the constitutional questions in oral argument and by brief in the Court of Criminal Appeals. In oral argument before the Court of Criminal Appeals, Respondent Clawson argued: (by counsel)

> "The reason is * * * North Carolina vs. Pearce and * * * also the Robinson vs. Beto case. These are cited in the brief and, of course the Court is well aware of them. Put those two cases together and this Court's opinion in Ex Parte Griffin and I think you can pretty well sum up this. That if a man is entitled, as this Court has said he is, to full credit for time laying in jail pending an appeal, then it's only a logical step to say that he is entitled to good time there because of this particular reason: If the man had not appealed, had not exercised his right of appeal and the avenue opened up to him by the statutes, then he would not have had to worry about the sheriff having any discretion or giving him good

time credit. He would have gone on down to the Department of Corrections where they wanted to get rid of him fast. He would have gotten thirty days credit the day he got there and would have been out with every possible credit in all probability. But if he appealed, then this Court would be saying that if you appeal, then you are going to get straight time and nothing else which is actually putting a penalty on the right of a man to appeal who is lying in jail because he can't make bond.

"I think clearly under the Pearce case, under the Robinson case, and under this Court's opinion in the Griffin case, that is unconstitutional and a right that a district judge in the State of Texas, sitting as Judge Clawson did, had to observe, had to take cognizance of and had to protect as this Court said in Bennett and in North Carolina vs. Pearce."

* * * *

"JUDGE DOUGLAS: Since 42.09 and these other articles appear to deal with cases on appeal, you still think the judge can come back and grant credit under 5118a even though that statute says this action will be applicable to a fine or jail sentence or to both?

"MR. BURLESON: I think the statute applies, in my judgment, to inmates of the county jail. Across the board. That's my opinion. And I think it is not compelled by the wording of the statute. *It's compelled by the Constitution which says that we are all going to be treated the same.* And if we have to construe this statute or even ignore it and say the judge has inherent power,

either way, go either direction, I think we still have to give this boy credit to give him *equal process or protection under the law.*"

As disclosed in the Petitioner's Petition for Writ of Certiorari, pages 14, 36-55, the constitutional issues were specifically raised by Petitioner before the Court of Criminal Appeals and urged upon that Court, not only by Respondent Clawson, but also by Petitioner. In oral argument before the Court of Criminal Appeals, Petitioner argued through his counsel:

"MR. TISINGER: Now, may it please the Court. The person, Johnnie Pruett—may it be stipulated that he has been discharged?

"MR. VOLLERS: Yes.

"MR. TISINGER: He therefore has a vested right. He has been discharged by a court of competent jurisdiction. *I don't think, under North Carolina vs. Pearce and all the other authorities as cited in our petition to dismiss, Intervenor's* Petition to Dismiss, which I hope the Court will read even though they have already overruled the motion, that under all of those authorities, I don't think there is any ambiguity that we need to be worried about."

* * * *

"Now, North Carolina vs. Pearce says that you've got to give him all his time. And I'm acquainted with Judge Onion's opinion and this Court's opinion previously announced that that

doesn't necessarily mean pre-sentence time. I'm also acquainted with what Judge Onion said that maybe the way is open, I believe it was in Bennet vs. State or maybe the Griffin case, in one of the cases he said the way may still be open as respect to pre-sentence time. I'm aware of all these things, may it please the Court. *But in any event, North Carolina vs. Pearce, Pearce vs. North Carolina said, and this Court quoted this language: That credit for good time must be included when you credit them with the time on appeal.*"

* * * *

"Now, but supposing that I am wrong and supposing that Article 5118a cannot be applied because in line with one Attorney General's Opinion, it was meant to apply only to misdemeanors. * * * —you've still got to face the penitentiary statute which is * * * 6184L which gives twenty days out of thirty for good conduct.

"*Now, is Johnnie Pruett neither fish nor fowl? Is because he simply took an appeal on the one hand, he can't get the benefit of the sheriff's statute and because he's not yet in the penitentiary, he can't get the benefit of the penitentiary statute, may it please this Court?* Those Tennessee cases that I cited say no. This man may be a criminal. We'll assume he is a criminal. But he is entitled as a civilian *to equal protection of the law of the United States.*"

"JUDGE DOUGLAS: What did that mean on the part of the insanity where he is in the hospital? He doesn't get anything but actual time. Would this knock out the statute? Is it your con-

tention that it would knock out that statute?

"MR. TISINGER: I'm just like Counsel, Your Honor. I'm not familiar with it. I respectfully beg leave to file an amended brief. I did, in the little time I had, exhaust myself, if I didn't exhaust the law on this proposition. And I would like to see that case because I don't know. Whatever it might say, if it please the Court, whatever it may say, how will it confound the holding in North Carolina vs. Pearce or Pearce vs. North Carolina which says you've got to give them all of their time?

"Now, I'm mindful of the language in one of Judge Onion's opinions that says, well, in North Carolina vs. Pearce * * * they are talking about prison time and not talking about time in jail. But may it please the Court, that was written before the Beto case had gone up to the Circuit Court. And however much difference that would make to Your Honors, I wouldn't presume to say. But I do know from your opinions that Your Honor is mistaken about the thing that I am thinking about now. And I know that in my opinion, *it's just not right to distinguish between time in jail and time in prison.* As counsel said, he would be a lot better off for a man to be in prison, as far as he's concerned and that would be a distinction without a difference, may it please the Court."

Then the State itself took up the issue in oral argument before the Court of Criminal Appeals:

* * * *

"But back to *the primary question* and that is the—I believe *it is really raised as an equal protection question* as to whether or not since the jail time statute, which obviously allows the sheriff to give the man credit for time in jail on a misdemeanor sentence either for fine or jail time, must be applied to a man awaiting the outcome of his appeal. I think that the argument so far has ignored the question, the basic difference between this and the penitentiary statute, which requires that a certain good time credit be given to a man in the penitentiaary unless a certain charge of misconduct is substantiated against him. There is no requirement in this statute that the good time be given. It's strictly a "may" statute. It says that the sheriff may give credit."

"In this case, under North Carolina vs. Pearce, under Robinson, under Griffin, all of these cases, the State has no objection to the fact that this man is entitled to credit for the time he has served. This is the penalty which has been exacted to which he is entitled to credit. However, he is not in a position under the authority of the statute to be entitled to credit for this reward. *And the equal protection clause says nothing about this reward nor does it say anything about the same thing,* as far as I know, it has not been applied to the cases of this Court which it has seen in the past that a man who is serving time in the penitentiary, who for some reason either by bench warratn or what have you is outside of the jurisdiction of the penal authorities of the State of Texas, he is not entitled to good time while serving on a sentence in the penitentiary.

"Of course, if he is held by reason of that order, he is entitled to credit for the time served but not

for good time during that period of time. And I think the biggest distinction is between the fact that this is the opportunity for the sheriff who has the custody of a man on a misdemeanor charge to reward him for his good conduct as well as the opportunity for the penal authorities to reward a man for his good conduct. *But we have a gap in our statutes which do not provide for any man, once he pleads guilty to start getting day for day time, whether he appeals or not because if he pleads guilty on a felony while he's awaiting transfer to the penitentiary, he gets day for day time because he is not in a position where the statute authorizes anyone to reward him for his good behavior nor is he penalized for his bad behavior in any way by losing credit for good time.*"

Judge Clawson's counsel replied:

"But in this case, Johnnie Pruett—I don't know the boy. He was apparently of good enough behavior to where nobody really made any note of it and certainly didn't follow the statute and keep a record of it or anything like that. And the real distinction—and *I take issue with State's counsel here on this equal protection thing.* I say here—I agree with him, it's equal protection question in a way. But the equal protection is not equating the "shall" and "may" and the disinction like that because *I think those all go out the window really when Constitutional questions are involved.*

"Our 42.03 says the Judge may at his discretion, but, really, this Court has already said he doesn't have any discretion any more. That's a "may" statute. *The "may" and "shall" mean noth-*

ing when you are dealing with equal protection. What must be equal is this: The man who appeals must be treated equally with the man who does not appeal. And there is no way this record can be looked at where Johnnie Pruett would have been treated equally if Judge Clawson had not given him credit for his good time."

* * * *

"So it seems to me, gentlemen, that you have already decided that the district judge does not have the authority to discharge a man. And suppose —just answer this one last question in your mind. Suppose that a district judge, as Judge Clawson, suppose instead of nineteen months, this boy had been in that jail twenty-six months. He had a twenty-four months sentence. Is there a man here who would say that Judge Clawson, when he had him in front of him, couldn't discharge him? That he had to send him to the pen?

"*JUDGE ONION:* Would he have done so under the provisions of Article 42.03 and *North Carolina vs. Pearce* or for twenty-six months, would he have had to rely at all on 5118a?

MR. BURLESON: He would have had to—that's true. But the question is the power to discharge. Now, all he had to do was give him credit. If he gives the credit, one kind of credit is much like another. If he gives it fairly according to an acceptable standard, appears to me that it makes no difference, what the source of the credit is as long as it's fair and it's *evenly* applied. And if you say he can—he can discharge a man who has twenty-six months jail time on a twenty-

four month sentence, then he can discharge a man with good time, also."

"Thank you."

Then Petitioner argued:

"MR. TISINGER: May I have forty-five seconds?

"JUDGE ONION: All right. We'll give you forty-five seconds.

"MR. TISINGER: Thank you.

"May it please the Court—

"JUDGE ONION: *Mr. Timekeeper, please note.*

"MR. TISINGER: We are not limited by Article 5118A and that would be a straw man. In the brief that we filed with Judge Clawson, we also referred him to 6184L where the man would be entitled to at least one-third. And therefore, the mere fact that Judge Clawson gave one-third time does not mean that he limited himself to 5118A. And, as stated by Judge Onion in Bennett vs. State and by the *Court in North Carolina vs. Pearce*, the *time subtracted must also "include time credited for good behavior."*

"JUDGE ONION: Thank you, counsel."

* * * * * *

The Opinion of the Court of Criminal Appeals notes

that Petitioner had offered a brief in the trial court in which was cited both *North Carolina v. Pearce*, 395 U. S. 711, and *Robinson v. Beto*, 426 F. (2) 797. (Such notation is copied with the whole Opinion in the Petition for Certiorari, Appendix A, page 27)

Such brief was offered in evidence before the Court of Criminal Appeals and was received by it. The brief appears here in the Petition for Certiorari, Appendix C, page 58. In that brief, Appendix C page 59, we said:

> "In the *Pearce* case, just cited above, the *Supreme Court of the United States said that credit must be given "for punishment already endured"; and that such must "be fully subtracted." ' 89 Sup. Ct. 2072, 2077. The Court in that case also said that the time subtracted must also include the time "credited for good behavior."* (italics supplied)
> "In the *Robinson* case, cited above, it was specifically held that credit must be given for time in jail pending appeal; and Judge Onion in the *Griffith* case, cited above, followed the *Robinson* case and held that the effect of the *Robinson* case was to destroy the trial court's discretion under Article 42.03 as to granting credit for time in jail pending appeal, and that *Robinson* means such credit must be given by subtracting from the total time given in the sentence. (457 S. W. (2) 65)
>
> "The reasoning behind both the *Robinson* and *Griffith* cases is that to leave it discretionary with the judge whether jail time will be subtracted is to deter a defendant from appealing out of fear that it will cost him time if his appeal is unsuccessful, and *that such deterrence is a denial of due process.* (italics supplied)"

In that Brief, Petitioner also said, Appendix C, pages 62-63:

> "Article 6184 l requires the credit set forth and says it "*shall*" be allowed. The fact that Article 5118a uses the word "may" must be ignored because to allow unlimited discretion is to allow invasion of legislative powers, but "may" must also be ignored for constitutional reasons. *It would deny the equal protection of the laws, within the meaning of the 14th Amendment to the Constitution of the United States, to say that felons must be granted credits but that county jail inmates need not be. Likewise, it would be unconstitutional argument to say that Johnnie Pruett has been neither fish nor fowl because he is not in the penitentiary and he is not the class of county jail inmate contemplated by Article 5118a. He is entitled to the equal protection of the laws.* (italics supplied) Such was the holding in *Gilliam v. State* (Tenn. 1939) 126 S. W. (2) 305, where the offense was a felony but the trial judge in his discretion sentenced the prisoner to the County Workhouse, as the statute permitted. If the prisoner had been sent to the penitentiary he would have received credits under the penitentiary code. The workhouse statute did not provide for credits and did not provide for record keeping, as did the penitentiary statute. The Court held that the prisoner's right to credit could not be defeated by sending him to the workhouse."

In Petitioner's Motion to Dismiss (Appendix B, page 44-48) filed in the Court of Criminal Appeals, it was stated:

"(3) Jurisdiction to sentence or resentence is given only to the District Court. Article 42.03 of the Code of Criminal Procedure expressly gives jurisdiction to resentence, after issuance of the mandate of the Court of Criminal Appeals to the District Court. The jurisdiction given by said Article is not to perform a ministerial function but to exercise judicial discretion, find the facts, and subtract at the very least the time spent in jail pending appeal. Ex parte *Griffith* (Tex. Cr. Ap.) 457 S. W. (2) 60. According to *North Carolina v. Pearce,* 395 U. S. 711, 89 S. Ct. 2072, the time subtracted must be all of the time in jail, and credit "for punishment already endured" must be fully subtracted. 89 Sup. Ct. 2072, 2077. *The time subtracted must also include time for good behavior.*" (89 Sup. Ct. 2077, footnote 13, recognized by Judge Onion in *Bennett v. State*, at 450 S. W. (2) 652-657."

* * * *

"Article 6184 l requires the credit set forth therein and says it "shall" be allowed. The fact that Article 5119a uses the word "may" must be ignored, because to allow unlimited discretion is to allow an invasion of legislative powers, and "may" *must also be ignored for constitutional reasons. It would deny the equal protection clause of the United States Constitution to say that felons in the pen must be granted credits, but that felons in county jail need not be. Likewise, it would be unconstitutional argument to say that Johnnie Pruett has been neither fish nor fowl because he is not in the penitentiary and he is not in the class of county jail inmates contemplated by Article 5118a.* (italics supplied) Such was the holding in *Gilliam v. State* (Tenn. 1939), 126

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On Page 50 of the Petition for Certiorari (Appendix B) is copied Petitioner's Plea for Relief in the Court of Criminal Appeals, where he alternatively asked the Court of Criminal Appeals to *itself* enter an order of discharge, saying to the Court of Criminal Appeals that if it had jurisdiction, and if Judge Clawson did not, *constitutional requirements compelled Johnnie Pruett's discharge.*

We say it would be an exercise in futility to force us now to go back to the Court of Criminal Appeals. Although we have duly preserved the point that we were denied procedural due process by the summary manner in which the Court of Criminal Appeals disposed of our Motions and refused us leave to intervene, and although we have not yet waived the procedural due process point, what we are now urging, in the main, is that we cannot now go back to the trial

court under Article 11.07 because the Court of Criminal Appeals has distinctly told Judge Clawson *not* to grant any relief for "good time." This means we would now have to go back to the Court of Criminal Appeals and go through the futile exercise of presenting the same arguments we have already presented. The Federal Courts do not require any such exercise in futility, even in the case of a collateral attack, which this is not. Sokol, *Federal Habeas Corpus*, 2nd Ed. 1939, Page 172-175.

The Supreme Court of the United States has said that absolute exhaustion of all State remedies is unnecessary when circumstances make it really impractical, and that a United States District Judge, sitting on an application for the Great Writ has the power in his discretion to dispense with such exercises in futility. *Fay v. Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 Led (2) 837; *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 Led 469; *Roberts v. Lavallee*, 389 U.S. 40. "*The rule of exhaustion is not one defining power* but one which relates to the appropriate exercise of this power." *Bowen v. Johnston*, 306 U.S. 19, 27. "This is not a case in which there is any substantial state interest in ruling again on petitioner's case." *Roberts v. LaVallee*, 389 U.S. 40, 43, 88 S. Ct. 194, 196.

We have already applied for relief to the Court of Criminal Appeals; and repetitious applications are not required. *Brown v. Allen*, 344 U.S. 443, 449, 487, 73 S. Ct. 397, 403, 422. Since this is not a habeas case, but a direct review, the "exercise in futility" should for even more cogent reasons not be required.

The authorities on exhaustion of remedies are collected with respect to Federal habeas corpus in Sokol "Federal Habeas Corpus" Second Edition, copyright, 1969, Pages 159-176.

The State remedy must be "effective" 28 U.S.C., Sec. 2254 (b).

ARGUMENT AND AUTHORITIES

(1) *Procedural Due Process was denied Petitioner by the Court of Criminal Appeals refusing to allow Petitioner to Intervene in this mandamus action.*

The procedure contemplated by Article 11.07 was not available to Petitioner, because Petitioner had already been *discharged.* Petitioner's complaint here is that the Court of Criminal Appeals ordered him committed *again.* The State makes now the spurious argument that Petitioner was bound to sit still, let his liberty be taken away, and *then* go through the futile gestures of habeas corpus before the same Court of Criminal Appeals that said he had no rights.

The statement on page 7 of the Brief in Opposition: "At no time has petitioner presented the constitutional issues which he now raises to the convicting court for a writ of habeas corpus returnable to the Texas Court of Criminal Appeals to determine whether he is entitled to relief" is a misleading statemet. Petitioner could not go back to the convicting court, because that

same court had discharged him, and it had been ordered by the Court of Criminal Appeals to reincarcerate him. He was at *liberty.* The writ could not be returnable to the Court of Criminal Appeals because it had already said it would not entertain a rehearing.

(2) *Petitioner was denied his Constitutional Rights when he was denied eligibility for good time credit while in the county jail awaiting appeal.*

The State speaks of the "reward" as though it were a gift. It is not. It is something *earned* and vested, *Ex Parte Anderson,* 192 S. W. (2) 280 (Tex. Cr. App. 1946)

The State only *surmises* a Legislative distinction between those finally convicted and those who are not, states "it would appear" that such distinction is valid, and that petitioner has not reached a status where good behavior is encouraged. In other words, he will be denied equal protection of the laws!

It is just as harsh to deny Petitioner good conduct time as it is to deny him actual time. All others receive good conduct time, whether they are in the county jail or in the penitentiary. The effect is to penalize him for taking an appeal.

The distinction urged is insubstantial. The principles in the case of *Baldwin v. Smith,* 316 F. Supp. 670 (D. Ct. Vt. 1970) are respectfully urged again.

The Federal Constitution may not require the granting of a right, a privilege, a power, or an immunity, in the first instance by a State. But once the State begins upon a program, the Federal Constitution requires that every right or privilege granted, every power granted, and every immunity granted must be extended to all. Antieau, Modern Constitutional Law 1969, 397-400, 562-650. (Vol. 1)

CONCLUSION AND PRAYER

The State would have the Court look the other way. The State contends that the issues are not necessary to be decided because it was not necessary for the Court of Criminal Appeals to decide them. The Court of Criminal Appeals did look the other way. It deliberately ignored Petitioner, in spite of the fact that North Carolina v. Pearce was expressly called to its attention. It had to look the other way to decide the case the way it did. But the Constitution of the United States will not be ignored in this Court. We respectfully pray for summary judgment and general relief.

Respectfully submitted

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SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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INDEX

Page No.

1. The Statutory Scheme Which Discriminates Against Felons Who Can Not Make Bond and Who Appeal Their Cases. ---------- 2

2. The Conflict Required by Rule 19, 1 (a) is sharp and direct, because Texas is already committed to following footnote 13 in North Carolina v. Pearce, 395 U. S. 711, 719, requiring recognition of good conduct credits. ---------- 3

3. The Unique and Intervening Circumstance That the Issues Here are also before the Court of Appeals for the Fifth Circuit Makes it Important that the Supreme Court state its Reasons for Denying Certiorari, if it does not grant Rehearing, Or that it State that the Court of Appeals Should Pass On the Case Without Being influenced by the Denial of the Writ. ---------- 3

CITATIONS

Page No.

Cases:

Maryland v. Baltimore, 338 U. S. 912, 917-20 4

North Carolina v. Pearce, 395 U. S. 711, 719 3

Kraft Foods v. Commodity Credit Corp., 266 F. (2) 254, cert. denied 361 U. S. 832 5

Simmons v. Union News Co., 382 U. S. 884, 886 5

Smotherman v. State (Tex. Cr. App. 1970) 455 S. W. (2) 285, 287 3

Statutes:

Article 6184 *1* Revised Civil Statutes of Texas 2

Texts:

Stern and Gressman, Supreme Court Practice, p. 213 5

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the Petitioner, Johnnie Pruett, and files this Petition for Rehearing, and respectfully moves for an order (1) vacating its denial of the Petition for Writ of Certiorari, entered on October 26, 1971,

and (2) granting the petition, or (3) stating reasons for denial. As grounds for this Motion, Petitioner states the following:

1. The Statutory Scheme Which Discriminates Against Felons Who Can Not Make Bond and Who Appeal Their Cases.

Reasonable minds can never differ on the proposition that a felon who is unable to make bond will be chilled and deterred against using his right of appeal, if he knows that during such appeal he can not get good time credit, especially when the statutes, as in Texas, automatically give him credit for 20 days out of every 30 if he enters the pen.

Such credit is not a reward for *good* conduct; it is an automatic part of his sentence, unless he has charges sustained against him for *bad* conduct. There is no status to *achieve*, looking toward rehabilitation, as suggested by the Respondent State of Texas. He has an automatic status which qualfies him under both Texas law and practice. Unless he is guilty of *misconduct*, and proved to be so guilty, he is entitled to the credit. Article 6184 *1* Texas Revised Civil Statutes. Upon entry into the Penitentiary he is automatically classified as a "Class 1" prisoner, and entitled to credit of *20 extra days per month*. Rules and Regulations of the Texas Department of Corrections, page 4, 3rd paragraph, copied in Appendix A, page 10.

Reasonable minds can not differ on the proposition that Petitioner, unable to make bond, who served 23 months in a county jail on a 24 month sentence, and

others of the class he represents, are denied equal protection of the law, because they took an appeal, when appeals always take many, many months, and the foregoing of an appeal would automatically mean that a 24 months sentence in the Penitentiary would be completed in 14½ months. In other words, by appealing unsuccessfully he is penalized by 9½ months confinement!

2. **The conflict required by Rule 19, 1 (a) is sharp and direct, because Texas is already committed to following footnote 13 in North Carolina v. Pearce, 395 U. S. 711, requiring recognition of good conduct credits.**

The "status" argument of the State falls before the case of *Smotherman v. State* (Ct. Crim. App. Tex. 1970), 455 S. W. (2) 285, 287. In that case the Court of Criminal Appeals expressly followed footnote 13 in *North Carolina v. Pearce,* 395 U. S. 711, 719. It specifically held that on resentencing a felon must be given credit for good conduct.

3. **The Unique and Intervening Circumstance That the Issues Here are also Before the Court of Appeals for the 5th Circuit Makes it Important that the Supreme Court State Its Reasons for Denying Certiorari, if it does not grant Rehearing, Or that It State that the Court of Appeals Should Pass on the Case Without Being Influenced by the Denial of the Writ.**

We are respectfully mindful of the doctrine that

denial of a Petition for Writ of Certiorari should not be taken as an indication by the Court of its Opinion on the merits. But an intervening circumstance, we believe, deserves the attention of the Court in this connection. Respondent, the State of Texas has perfected its appeal from the judgment of Judge Suttle (Western District of Texas) which released Petitioner on his Petition for Writ of Habeas Corpus. That appeal now pends before the Fifth Circuit.

Therefore, this present instance "is peculiarly one where the redundant becomes the necessary." Mr. Justice Frankfurter in *Maryland v. Baltimore*, 338 U. S. 912, 917-20. "It becomes necessary to say that denial of this petition carries no support whatever for concluding that either the majority or the dissent in the court below correctly interpreted the scope of our decisions * * *."

The record in this case affirmatively reflects that the Supreme Court has considered the merits of Petitioner's complaint. Mr. Justice Stewart voted for a stay well before Petitioner was reincarcerated. The whole Court twice refused a stay. Yet while the Petitioner's application for habeas relief was pending before Judge Suttle in the Western District at San Antonio, some of the Justices asked the Clerk to obtain the status of Petitioner's application for habeas relief. Furthermore, on August 24, 1971, the Court directed the Clerk to request of Respondent Texas that it file a response, and that such response should not be limited to but should specifically be addressed to "the constitutionality of denying eligibilty for good time credit to those in county jail awaiting appeal when

the state allows misdemeanants in county jail and felons in the penitentiary to be eligible for good time credit."

In view of this circumstance, the State will surely argue before the Court of Appeals as Mr. Justice Jackson said:

> "The Court is not quite of one mind on the subject. Some say denial means nothing, others say it means nothing much. Realistically, the first position is untenable and the second is unintelligible. How can we say that the prisoner must present his case to us and at the same time say that what we do with it means nothing to anybody . . ." (344 U. S. 542-543)

The doubtful muddle which a denial of certiorari sometimes causes was noted by Mr. Justice Black in *Simmons v. Union News Co.*, 382 U. S. 884, 886; and the authorities are collected by Stern & Gressman in *Supreme Court Practice*, Fourth Edition, Page 213 et seq.

Surely Petitioner is entitled to go before the Court of Appeals for the 5th Circuit without being there hampered by the doubts which assailed the 7th Circuit in *Kraft Foods v. Commodity Credit Corp.*, 266 F. (2) 254, 263, cer. denied 361 U. S. 832, when it said "* * * the lack of at least four for granting certiorari cannot realistically be considered meaningless * * *"

The Court has already labored so over this case that it would seem proper for it to indicate its tentative

views to the Fifth Circuit. That latter Court now has before it the tremendous burden of searching a voluminous record. It, like the Supreme Court, is overburdened with the flood of litigation.

CONCLUSION

For the reasons set forth, as well as those contained in the petition for writ of certiorari, Petitioner prays that this Court grant a rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below, or in the alternative indicate its views by memorandum opinion at this time showing why certiorari is denied.

Respectfully submitted

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CERTIFICATE OF COUNSEL

As counsel for Petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

Counsel for Petitioner

APPENDIX A

STATE OF TEXAS

RULES AND REGULATIONS

of the

TEXAS DEPARTMENT OF CORRERCTIONS

Adopted by Board

July 13, 1953

Revised January 1, 1968

GEORGE J. BETO, Ph.D.
Director of Corrections

BOARD OF CORRECTIONS

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PREFACE

This booklet is designed to give you a working knowledge of the policies, rules, and regulations under which the Texas Department of Corrections operates. It is impossible to cover every situation that may develop. You will consult the officer in charge concerning anything you do not understand.

It is not the fault of the officials of the Texas Department of Corrections that you are here. You were committed to their care in accordance with the laws of the State. We want to help you improve your position in life. If your attitude is good, you can learn some skill and improve your knowledge to the extent that you can live in harmony with your fellowman when released.

All improvement in the human race comes from:

(1) THE ABILITY TO THINK AND REASON.

(2) CHARACTER DEVELOPMENT.

(3) AMBITION.

You must put forth your best energies to acquire and improve these qualities within yourself. It is our wish that when you leave this institution you will go back into the free world and make a place for yourself, live an honorable life, and develop into a citizen who will bring credit to his community and his State.

H. H. COFFIELD

Texas Board of Corrections

INTRODUCTION

Whenever two or more men live together, rules and regulations are necessary for governing their lives. Whenever a social group is without rules, anarchy prevails.

The rules and regulations in this booklet are designed primarily for the benefit of the inmates under the care of the Texas Department of Corrections. While they allow a relaxed prison atmosphere, they serve to discipline the inmate, protect his safety as well as that of his fellows, contribute to the achievement of the objectives of the industrial and agricultural program of the Department of Corrections, and aid in a program of rehabilitation.

A disregard for these rules will result in a prolonged stay in the Texas Department of Corrections, less desirable work assignments, and punishment. Their observance, conversely, will aid the inmate in receiving parole or early discharge, a choice work assignment and a considerable number of privileges which lighten the essential burden of prison life.

The choce to observe or to disregard these rules lies with the individual inmate.

GEORGE J. BETO, Ph.D.
Director

COMMUTATION OR OVERTIME

The commutation or "good time" law, as provided by Article 6184L of the Revised Civil Statutes of Texas, sets forth the standards of overtime or good time for inmates in the Texas Department of Corrections. The Texas law is liberal and grants more commutation time than do most other states or the Federal Bureau of Prisons.

Under the Texas commutation law there are three classes of commutation time or "good time." These good-time or time-earning categories are referred to as Class I, Class II, and Class III.

CLASS I provides that each inmate in this time-earning class will receive a total of twenty extra days time for each month served on his sentence, so long as that inmate maintains a clear conduct and work record. *Whenever any inmate is received in the Texas Department of Corrections, he is immediately placed in Class I.*

CLASS II provides that any inmate in this class or category will receive a total of ten extra days time for each month served. This class is set aside for those inmates who have been found in violation of certain rules and regulations of the Texas Department of Corrections. The State Disciplinary Committee is the governing authority for placing an inmate in this classification.